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THE
AMERICAN LAW REGISTER
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REVIEW.

JANUARY, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR DECEMBER.

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According to a recent decision of the Supreme Court of Texas, when parents have voluntarily relinquished their right to the custody of their child to others, who thereupon formally adopt it; and both its parents and foster parents are fully capable of providing for it; the court will not, on *habeas corpus*, return it to its parents, unless it appears that it would be benefited by the change of custody: *Legate v. Legate*, 28 S. W. Rep. 281; and in the opinion of the Supreme Court of Rhode Island, an adopted child will be accorded the same right of inheritance, both as to real and personal property, in states whose laws are the same in this regard as those of his domicile, as if his adoption had taken place in the former: *Martin v. Martin*, 30 Atl. Rep. 467. This is in full accord with the general rule, which is, that the status of an adopted child, under the laws of the state of his adoption, will be recog-

Adoption.
Custody of
Child

Right
to inherit

nized and upheld in every other state, unless that status, or the rights flowing therefrom, is inconsistent with, or in opposition to, the laws and policy of the state where it is sought to be enforced: *VanMatre v. Sankey*, 148 Ill. 536; S. C., 36 N. E. Rep. 628; *Keegan v. Geraghty*, 101 Ill. 26; *Ross v. Ross*, 129 Mass. 243.

Judge Dallas, of the Circuit Court for the Eastern District of Pennsylvania, in *In re Bodek*, 63 Fed. Rep. 813, has very succinctly defined the limit to the right of an alien to become a citizen of this country, a right which has been too much abused in the interest of political parties. According to Judge Dallas's opinion, the oath of an applicant for naturalization to support the Constitution of the United States, should not be accepted, if, upon examination, it appears that he does not understand its significance, or is without such knowledge of the constitution as is essential to the rational assumption of an undertaking to support it; and the courts should not admit an applicant to citizenship, without being satisfied that he has at least some general comprehension of what the constitution is, and of the principles which it affirms. The requirements as to moral character and a disposition to good order should also be shown by competent evidence.

The Supreme Court of North Carolina has lately held, that the owner of premises, who, with knowledge of the vicious and dangerous character of a dog owned by his agent, permits the agent to retain him, and to allow him to run at large on the premises, is liable for any damages done by him to a passer by: *Harris v. Fisher*, 20 S. E. Rep. 461.

The master is also liable for damage done by his servant's dog to sheep, if he knew its viciousness: *Jacobsmeier v. Puggemoeller*, 47 Mo. App. 560. An uncle who allows his nephew, living with him, to keep a dog known to be vicious, is liable for damage done by it: *Snyder v. Patterson*, 161 Pa. 98; S. C., 34 W. N. C. 288; 28 Atl. Rep. 1006; and the owner of the premises is liable, regardless of the ownership of

the dog, if he suffers the dog to be on his premises, and exercises rights of ownership over him, knowing his vicious character: *Hornbein v. Blanchard*, 35 Pac. Rep. 187. But directors of the poor are not liable for damages done by a dog, kept by the steward of the poorhouse on the premises, and left there after his removal from the county farm, there being no evidence that they authorized or acquiesced in the animal's presence: *Sprout v. Directors of the Poor*, 145 Pa. 598; S. C., 29 W. N. C. 461; 23 Atl. Rep. 380. And the owner of a stable, who allows an employé to keep a vicious dog there, is not liable to another employé, who knew the dog's character as well as the employer, but went voluntarily within his reach, though he was securely chained at the time: *Farley v. Picard*, 78 Hun, 560; S. C., 29 N. Y. Suppl. 802. There is a very full collection of cases on this subject in 27 Am. L. Reg. 631.

The Supreme Court of Oregon has recently decided a very interesting question, in *Darling v. Vulcan Iron Works*, 38 Pac.

Rep. 342, by holding that, under articles of apprenticeship, allowing a master to retain ten per cent. of the apprentice's wages till the expiration of the contract, to be forfeited if he left the master's service without the master's consent, or was discharged for any wilful violation of the contract, and giving the master the right to terminate the contract at any time on paying the apprentice the amount standing to his credit, if the master arbitrarily discharges the apprentice, without making such payment, he is liable, not only for the amount standing to the apprentice's credit, but also for all damages sustained by him by reason of his discharge.

The Supreme Court of Texas has affirmed the decision of the Court of Civil Appeals, in *City Natl. Bk. v. Merch. Natl.*

Bk., 27 S. W. Rep. 848, that several interdependent deeds of trust, passing titles to all of a debtor's property subject to execution, for the benefit of certain creditors, with a proviso that the surplus, if any, is to be distributed among his other creditors, holding

Assignment
for Benefit
of Creditors

legal claims, will constitute a general assignment: *City Natl. Bk. v. Merch. Natl. Bk.*, 28 S. W. Rep. 277; see 1 AM. L. REG. & REV. (N. S.) 850.

It has been recently decided by the Supreme Court of Missouri, in *State v. Morgan*, 28 S. W. Rep. 17, that (1) In proceedings on a *sci. fa.* to show cause why a judgment against the bondsmen for breach of the condition of a recognizance of bail entered into by a defendant should not be made absolute, the validity of the indictment cannot be inquired into; (2) That such proceedings are so nearly civil, that an answer over, after a demurrer is overruled, is a waiver of the demurrer; and (3) That the fact that indictments similar to that drawn against defendant were held bad, and the case in which his was held to be good overruled, is no excuse for his failure to appear according to the condition of the recognizance. And the same court has ruled, in *State v. Murmann*, 28 S. W. Rep. 2, that when the surety produced his principal in court at the time named in the recognizance, and the case was called, the jury impanelled, the evidence taken, and a verdict of guilty rendered, and thereupon a deputy sheriff took hold of the principal, and left the court-room with him to conduct him to jail, and no order was made for a continuance of the case, this manual caption of the principal by the sheriff dispensed with the necessity of a formal surrender of the principal, and the surety was discharged.

A formal surrender is not in all cases essential; and yet the surety is so strictly held to his undertaking, that it is always the safer course. Any act of the law, however, which takes the principal out of the hands of the bail, as in the present case, or which interferes with the power of the bail over the principal, is justly held to release the surety. Accordingly, the surety is discharged, when, after the prisoner is delivered by him to the sheriff, pursuant to an order of court, he is then released by another order, made without the application or knowledge of the bail, and escapes: *Pro. v. McReynolds*, (Cal.) 36 Pac. Rep. 590.

But the re-arrest and conviction of the principal on the same charge, after the bond has been forfeited, will not release the sureties thereon: *State v. Warwick*, 3 Ind. App. 508. And when the principal in a recognizance pleaded guilty, and was fined on another charge, in the same court in which his presence was required by the recognizance, and was then taken by a deputy sheriff to the clerk's office, where the fine was paid, the whole time so spent not being over five minutes, the detention was held not to release the surety; nor was he released by a mere request to a deputy sheriff to take the principal into custody: *Pea v. Robb*, 98 Mich. 397; S. C., 57 N. W. Rep. 257.

The Supreme Court of New Jersey has very justly ruled, that if a question is raised as to the truth of a statement in a bid, which, under the law, would, on its face, entitle the bidder to the contract, the awarding board cannot decide that question against the bidder, and award the contract to another, without giving the first bidder an opportunity to be heard: *State v. Board of Chosen Freeholders of Hudson Co.*, 30 Atl. Rep. 548. But the Supreme Court of Minnesota, in *Elliott v. City of Minneapolis*, 60 N. W. Rep. 1081, maintains, that in the absence of fraud or abuse of discretion, a municipal corporation may award a contract to another than the lowest bidder, if the municipal charter does not prescribe the mode of awarding and entering into such contracts, and if the contract made is otherwise within the scope of the corporate powers. There is an excellent annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 899. See also *Ibid.*; 742, 819, 820, 851.

The Supreme Court of Nebraska has decided a most important question in regard to the rights of members of building associations, in *Randall v. Nat. Bdg. Loan & Protective Union*, 60 N. W. Rep. 1019, where it held, that when a contract of membership in a building association provided for the forfeiture of the stock in case any payment should not be made when due; and a member having bor-

rowed money on mortgage, made a number of payments on the stock, and also on interest and premium, but then ceased to pay, whereupon the association declared her stock forfeited, and brought suit to foreclose the mortgage; the payments on the stock should be applied as payments *pro tanto* on the loan, in an accounting of the amount due on the mortgage.

According to the Supreme Court of Florida, a supreme court has power, on the common law suit of *certiorari*, to review and quash the proceedings of inferior tribunals, when they proceed in a cause without jurisdiction, or when their proceedings are essentially irregular, and not according to the requirements of law, and no appeal or other direct mode of reviewing their proceedings exists. The writ in such a case, however, does not issue of right, but rests in the sound discretion of the court; and when issued, will not serve the purpose of a writ of error, or appeal, with bill of exceptions. The office of such a writ, when issued to review the proceedings of an inferior court, is to bring up for inspection the entire record of the proceedings of that court, in order that the superior court may determine therefrom whether the inferior court acted within its jurisdictional powers, or whether its proceedings were essentially regular, and in accordance with the requirements of law: *Jacksonville, T. & K. W. Ry. Co. v. Boy*, 16 So. Rep. 290.

The Circuit Court of Appeals of the Eighth Circuit, in *Theron v. N. Pac. Ry. Co.*, 64 Fed. Rep. 84, has lately held, that an action for death by wrongful act, occasioned in a state which gives three years within which to bring suit therefor, may be maintained at any time within the three years, in another state, which limits the time of suit to two years; and the Court of Appeals of Kentucky holds, that in such a case the amount recovered is to be distributed according to the laws of the place of the act which caused the death: *McDonald v. McDonald's Admr.*, 28 S. W. Rep. 482.

The great railroad strike is over, but the litigation to which it gave rise is still vigorous. The Circuit Court for the Eastern District of Missouri has again passed upon the effect of the Act of Congress of July 2, 1890, 26 Stat. at Large, 209, and in accordance with the current of authority, ruled: (1) That a combination of railroad employees to prevent all the railroads of a large city, engaged in carrying the United States mails, and in interstate commerce, from carrying freight and passengers, hauling cars, and securing the services of persons other than strikers, and to induce persons to leave the service of such railroads is within the first section of the act mentioned, which provides that every contract, combination in the form of trust, or otherwise, "or conspiracy in restraint of trade or commerce" among the states, is illegal; (2) That under § 5 of the same act, an injunction order, in an action to enjoin an illegal conspiracy against interstate commerce, may provide that it shall be in force on defendants not named in the bill, but who are within the terms of the order, when it also provides that it is operative on all persons acting in concert with the designated conspirators, though not named in the writ, after the commission of some act by them in furtherance of the conspiracy, and service of the writ on them: *U. S. v. Elliott*, 64 Fed. Rep. 27. See *In re Elliott*, 62 Fed. Rep. 801, and 1 Am. L. Reg. & Rev. (N. S.), 823.

The Supreme Court of Pennsylvania, in the Gallitzin School case, recently decided, missed an excellent opportunity to vindicate its ability, and, instead, laid itself open to severe censure. In that case it held, Williams, J., dissenting, that the employment by the school directors, in the common schools, of nuns of the sisterhood of St. Joseph, a religious society of the Roman Catholic Church, in the absence of proof of religious sectarian teaching or exercises, was purely an exercise of the discretion of the directors, was lawful, and not subject to review by the courts; (which is true, if the premises are granted,) and then deliberately went on to hold, in the coolest disregard of facts, that the wearing of the dis-

tinctive garb and insignia of that sisterhood by the nuns, while teaching in the public schools, coupled with free instruction in the catechism of their church to all who chose to attend, both before and after school, could not be termed sectarian teaching, and was not unlawful!!! *Hysong v. School Dist. of Gallatin Borough*, 30 Atl. Rep. 482. It would really seem as if the learned court had forgotten the vast superiority of practice over precept, and the peculiarly impressionable nature of young children.

The Supreme Court of Washington has recently held that a promise to a third party to accept a bill of exchange which has been, or is to be issued, does not fall within the statute of frauds; and that when the defendant authorized B. to draw certain orders, which he agreed to pay, and after those orders were drawn, told plaintiffs that if they would purchase them, he would afterwards accept and pay them, and plaintiffs purchased some of the said orders, the defendant cannot set up as a defence that the plaintiffs were neither parties, privies, nor beneficially interested in his contract with B.: *Kelley v. Greenough*, 38 Pac. Rep. 158. The Court of Appeals of England has gone a step farther, and held that a promise by the defendant, that, in consideration of plaintiff's accepting certain bills of exchange for a firm of which defendant's son was a partner, he, the defendant, would provide plaintiff with funds to meet those bills, is a contract of indemnity from liability to make payment on such bills, and not of guarantee, and, therefore, not within the statute of frauds, and may be made orally: *Guild v. Conrad*, [1894] 2 Q. B. 885. It seems to be now the generally accepted view, that, apart from special statutory provisions, a promise to accept a bill of exchange is not within the statute of frauds, on the ground that the acceptance of a bill of exchange is an original undertaking: *Scudder v. Bank*, 91 U. S. 406; *Hall v. Cordell*, 142 U. S. 116; S. C., 12 Sup. Ct. Rep. 154; affirming *Cordell v. Hall*, 34 Fed. Rep. 866; and Missouri and Pennsylvania, at least, have found it necessary to pass statutes requiring acceptances to be in writing:

Contracts,
Statute of
Frauds

First Natl. Bk. of Rule v. Gordon, 45 Me. App. 293; *Natl. State Bk. of Camden v. Linderman*, 161 Pa. 199; S. C., 28 Atl. Rep. 1022. But even when so required, no one but the acceptor can raise the objection that the acceptance was oral: *Ulrich v. Hower*, 156 Pa. 414; S. C., 33 W. N. C. 17; 27 Atl. Rep. 243; *Moeser v. Schneider*, 158 Pa. 412; S. C., 33 W. N. C. 259; 27 Atl. Rep. 1088.

In general, a mere promise of indemnity to a third person is not within the statute of frauds: *Thomas v. Cook*, 8 B. & C. 728; *Wildes v. Dudlow*, 19 L. R. Eq. 198; *In re Bolton*, 8 T. L. R. 668; and this rule applies to a promise to indemnify the surety on a liquor dealer's bond: *Smith v. Delaney*, 64 Conn. 264; S. C., 29 Atl. Rep. 496; to a contract of agency, by which the agent agrees to be responsible for the non-payment of debts which may thereafter become due by others: *Sutton v. Grey*, 69 L. T. (N. S.) 354; to a promise to indemnify one if he will indorse K.'s notes, so that K. can have them discounted: *Jones v. Bacon*, 72 Hun, 506; S. C., 25 N. Y. Suppl. 212; and to a verbal promise of A. to B., to indemnify him if he will become surety for C. for a debt of the latter to D.: *Minick v. Huff*, (Neb.), 59 N. W. Rep. 795. But it is held in Illinois, that a guarantee of indemnity to a surety is within the statute: *Wahrman v. Kesseler*, 45 Ill. App. 155; *Farmers' & Mechanics' Bk. v. Spear*, 49 Ill. App. 509.

In the opinion of the English Court of Appeals, copyright, under their statute, cannot be claimed in a cardboard pattern sleeve, containing upon it scales, figures and descriptive words, for adapting it to sleeves of any dimensions, as a "map, chart or plan," but, *scumble*, it might be the subject of patent, as an instrument or tool: *Hollinrake v. Truswell*, [1894] 3 Ch. 420; reversing [1893] 2 Ch. 377. Such a chart has, however, been held the proper subject of copyright as a "book," under the U. S. statute: *Drury v. Ewing*, 1 Bond, 540.

Southern District, has held that when the statute requires the **Corporations, Directors** directors of a corporation to be stockholders, holding and owning shares of the capital stock in good faith and in their own right, a person who holds and owns no shares of stock can be elected a director, and afterwards qualify himself by acquiring the requisite number of shares in good faith and in his own right: *Greenough v. Ala. & G. S. R. Co.*, 64 Fed. Rep. 22.

It has been recently decided by Stirling, J., in the Chancery Division, in England, that when a company, having the power to distribute its profits as dividends or as capital, declares a dividend, which it is in a position to pay as cash, and pays one-half in cash, and in respect of the balance offers an allotment of new shares to the stockholders, paying the rest of the dividend in cash to such as do not accept the offer; and trustees for a wife, tenant for life under the will of a testator who owned shares in the company, accept the allotment, and allow the new shares to be allotted to the tenant for life; (1) That the company intends to distribute the profits as dividends, and not to capitalize them; and (2) That the tenant for life is entitled to only so much of the value of the new shares as represents the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate: *In re Malam*, [1894] 3 Ch. 578. This is in accord with the decision in *Hite v. Hite*, (Ky.), 20 S. W. Rep. 778. There is an annotation on this latter case in 1 AM. L. REG. & REV. (N. S.) 149.

In the opinion of the Supreme Court of Washington, an agent in charge of a branch store belonging to a corporation that has a manager exercising general control of the business, including that transacted by such **Service, Managing Agent** agent, is not a "managing agent," within a statute providing that service on a corporation may be made by delivering a copy of the summons to its managing agent: *Osborne v. Columbia Co. Farmers' Alliance Corp.*, 38 Pac. Rep. 160. The general superintendent of a corporation is within that description, however: *Barrett v. Amer. Telephone & Telegraph Co.*, 138 N. Y. 491; S. C., 34 N. E. Rep. 289.

A very interesting decision on the question of the common law powers of the federal courts has been rendered by Grosscup, Dist. J., in the Circuit Court for the Northern District of Illinois, in *Swift v. Phila. & Reading R. R.*, 64 Fed. Rep. 59. He acknowledges the existence of a common law of the United States in territory under exclusive federal jurisdiction, but denies it elsewhere, claiming that within the boundaries of the several states, there exists no common law of the United States as a distinct sovereignty, neither the constitution nor Congress having adopted that law, and the power of the nation to make laws within the field of power assigned to it by the constitution, being exercised only by express enactments of Congress, or by treaties; and, therefore, an action for excessive rates on interstate freight cannot be maintained, unless based on the provisions of the interstate commerce act, as that is exclusively within the jurisdiction of the federal courts. See *Swift v. Phila. & Reading R. R. Co.*, 58 Fed. Rep. 858.

The Supreme Court of the United States, Justices Field and Shiras dissenting, has just enunciated a very important doctrine, which, it is to be hoped, will act as a check to the unscrupulous abuse of legal process by some criminal lawyers, to the effect that, except in cases of urgency, (which, of course, rest in the discretion of the judge), one in custody under process from a state court should not be released by a federal court on *habeas corpus*, on the ground that the crime with which he is charged is within the exclusive jurisdiction of the federal courts, or that he is detained in violation of the federal constitution; but the decision of the highest court in the state should be first obtained on the question, and this, if adverse, may be reviewed by the Supreme Court of the United States: *New York v. Ess*, 15 Sup. Ct. Rep. 30. This, it is to be hoped, will forever quiet the preposterous claim, that the mere suggestion of a federal question is enough to make the issuing of a *habeas corpus* by the federal courts a matter of right.

The same court, in *Lloyd v. Matthews*, 15 Sup. Ct. Rep.

Courts,
Federal.
Jurisdiction.
Common
Law

Federal
Question,
Habeas
Corpus

70, has very clearly defined the method necessary to properly raise the question of the "full faith and credit" to be given to the laws of other states, by holding that when, in an action in a state court, the parties plead and claim rights under statutes of a foreign state, but the defeated party does not plead the construction given to such statute by the courts of the foreign state, or put in evidence the laws and the printed books of the adjudged cases of such state, or prove the common law of that state by the parol evidence of persons learned in that law, as required by the law of the state where the action is tried, such party cannot appeal from the highest court of the latter state to the Supreme Court of the United States, on the ground that such court did not give the full faith and credit to the public acts, records and judicial proceedings of such foreign state, which the Constitution and laws of the United States require, and that, therefore, a federal question is presented.

Federal
Question.
Foreign
Laws

Another very interesting question has recently been passed upon by the Circuit Court for the Southern District of Ohio, Eastern District, as to following state decisions, that when a federal court has decided on demurrer that a state statute, the validity of which has never been passed upon by the highest court of the state, is in violation of the constitution of that state, and afterwards, but before final decree entered in the federal court, the Supreme Court of that state decides that the statute is constitutional, the federal court will reverse its former ruling in deference to the decision of the state court: *Western Union Telegraph Co. v. Pac.*, 64 Fed. Rep. 9.

Following
State
Decisions

The Supreme Court of Tennessee has lately rendered a very sensible decision, in *Wilcox v. State*, 28 S. W. Rep. 312, to the effect that an "irresistible impulse" is not an excuse for crime, when the person who commits it is capable of knowing right from wrong; and that if a person, otherwise rational, commits a homicide through delusion on a subject connected with the homicide, he is criminally responsible, provided he was conscious of right and

Criminal Law,
Irresistible
Impulse

wrong as applied to the act, and had the ability, because of such consciousness, to choose, by an effort of the will, whether he would commit the act or not. See 15 Crim. L. Mag. 769.

The Supreme Court of Mississippi has lately been confronted with one of the most singular and absurd defences

Autrefois
Attaint that a court of law was ever molested with by the perverted ingenuity of the professional palliators of crime. It was gravely claimed that a prosecution for murder could not be sustained, because, at the time when it was committed, the accused was a convict under sentence of imprisonment for life for a previous murder. But the court was equal to the occasion, and as gravely replied that the plea of *autrefois attaint* was never recognized in this country, save in one case, *Crenshaw v. State*, Mart. & Yerg. (Tenn.), 122, and was expressly repudiated in *State v. McCarty*, 1 Bay. 334; *Hawkins v. State*, 1 Port. (Ala.), 475; that it was not admissible in this country, because attainder, corruption of blood, and consequent forfeiture, resulting from convictions under the common law, do not exist in this country; and that, even if such were the case, the rule would not apply to the circumstances of the case in hand: *Singleton v. State*, 16 So. Rep. 295.

The Chancery Division of England, in *In re Isaacs*, [1894] 3 Ch. 506, following *Lawes v. Bennett*, 1 Cox, 167, has ruled, that the purchase money of real estate, sold in pursuance of an option exercisable only after the death of the giver, will be treated as personality, and go to the personal representatives, though the deceased died intestate.

Divorce,
Alimony The Court of Appeal of England, in *Hanbury v. Hanbury*, [1894] 2 Q. B. 315, has held, that when a husband is a partner in a firm, and entitled to receive a certain sum per month in respect of his share of the profits, but cannot draw any further share thereof without the assent of the other partner, he is to be regarded as having an income, for purposes of alimony, of only the monthly sum, when that is in

fact all that he has received for several years, though his actual share of profits was much in excess of that, the surplus being carried to his credit on the partnership books.

The Supreme Court of Nebraska has lately had occasion to pass upon a complicated state of affairs, in the contested election case of *Hendee v. Hayden*, 60 N. W. Rep. 1034. In one precinct the "spoiled ballots,"

Elections,
Contest,
Count

of which several had been cast at the election, had been, irregularly and contrary to the provisions of the election laws, but without any fraudulent intent, strung upon the same string as the ballots cast, but at one end thereof, and in a separate bundle, with the string looped and tied around it, making a knot which divided the spoiled from the other ballots. On the trial of the case, the votes cast in that precinct were brought into court, and the package in which they were enclosed and sealed was opened, and the ballots recounted; but during the recount these spoiled ballots were counted with the ones cast at the election, and so mixed with them as to be indistinguishable from them. On this state of facts the Supreme Court held, (1) That the recount, under such circumstances, did not establish the result of the election as between the contesting parties, and that by the intermingling of the "spoiled" ballots with the others, they were rendered incompetent as evidence of the result of the election; (2) That as the will and choice of the voters expressed at the election, in the absence of fraud or illegality, should be ascertained, if any authentic or satisfactory testimony existed by which the result might be proved, the returns made by the county clerk being *prima facie* evidence of the facts therein set forth, were competent, and should have been considered by the court; (3) That it was not competent, under the circumstances above detailed, to apportion the "spoiled" ballots between the contesting parties, and to deduct from the vote of each a share of the spoiled ballots, proportioned according to the whole number of votes cast for him.

The Supreme Court of Illinois, in *Miles v. Andrews*, 38 N.

E. Rep. 644, has ruled, that when it is admitted that plaintiff and defendant conversed by telephone at a certain time, a witness who heard one side of the conversation may testify to it, though he could not hear the replies, and did not know of his own knowledge with whom the conversation was held; though, perhaps, his testimony is entitled to but little weight.

Evidence.
Conversations
by Telephone

It is proper to admit statements made by telephone, when the witness to whom the statements were made testifies that he knew and recognized the voice of his interlocutor: *Stepp v. State*, 31 Tex. Cr. Rep. 349; S. C., 20 S. W. Rep. 753. And it has even been held that conversations by telephone are admissible as evidence, though they were carried on through the medium of an operator at an intermediate station, the parties being unable to hear each other: *Oshamp v. Gadsden*, (Neb.), 52 N. W. Rep. 718.

The Supreme Court of Missouri has lately held, in *State v. Evans*, 28 S. W. Rep. 8, that though the declarations of a deceased person are inadmissible when first uttered, yet if he subsequently reaffirms them, under a consciousness of the fact that he is dying, they are admissible as dying declarations; and that when the deceased states that he is shot to death, his declarations made at the time are admissible, though he also asks that a physician be sent for, as such a wish, under the circumstances, shows merely a desire to be relieved from pain.

Dying
Declarations

Declarations made when not in expectation of death are admissible, when subsequently reaffirmed by deceased when conscious of the approach of death, if re-read or repeated to him, and then assented to by him: *Million v. Comm.*, (Ky.), 25 S. W. Rep. 1059; *Reg. v. Steele*, 12 Cox C. C. 168; and are admissible, if so reaffirmed, even though not repeated or re-read: *Johnson v. State*, (Ala.), 16 So. Rep. 99; *Pro. v. Cross*, (Cal.), 36 Pac. Rep. 367.

Sending for a physician will not negative the expectation of death, if that fact is shown by the declarations: *R. v. Howell*, 1 Den. C. C. 1; *McQueen v. State*, (Ala.), 15 So. Rep. 824; *contra*, *Matherly v. Comm.*, (Ky.), 19 S. W. Rep. 977.

According to the Court of Appeals of Colorado, a letter, duly addressed, stamped and mailed, with a return card attached thereto, which has not been returned to the sender, is conclusively presumed to have been received, in the absence of rebutting evidence: *Sherwin v. Natl. Cash Register Co.*, 38 Pac. Rep. 393. This is in conformity with the general rule on the subject, that proof of mailing a properly stamped and addressed letter is *prima facie* evidence of its receipt by the addressee: *Young v. Clapp*, 147 Ill. 176; S. C., 35 N. E. Rep. 372; affirming 32 N. E. Rep. 187; *McFarland v. U. S. Mut. Acc. Assn. of City of N. Y.*, (Mo.), 27 S. W. Rep. 436, and, if not denied, will be conclusive: *Home Ins. Co. of N. Y. v. Marple*, 1 Ind. App. 411; and will overcome the merely negative testimony of the addressee that he did not receive it: *In re Willsc*, 25 N. Y. Suppl. 733; S. C., 5 Misc. Rep. 105. This presumption may, however, be rebutted: *Whitmore v. Ins. Co.*, 148 Pa. 405; S. C., 30 W. N. C. 277; 23 Atl. Rep. 1131; and, if denied, becomes a question for the jury; but a verdict for the plaintiff generally implies a finding that the defendant received the letter in question: *Jensen v. McCorkell*, 154 Pa. 323; S. C., 32 W. N. C. 355; 26 Atl. Rep. 366. Proof by the secretary of a corporation that a letter was folded and enclosed in a sealed envelope, and put in a basket in the office, in which letters were usually put for mailing, coupled with the fact that it was not found among the papers of the corporation, is evidence to go to the jury on the score of mailing, though the porter whose duty it was to mail the letters put in that basket did not recollect mailing such a letter: *Hastings v. Brooklyn L. I. Co.*, 138 N. Y. 473; S. C., 34 N. E. Rep. 289; affirming 17 N. Y. Suppl. 333. But the date of a letter affords no basis for calculating the time of its receipt, nor proof of the time of mailing, nor that it was ever mailed: *Uhlman v. Arnhold & Schaefer Brewing Co.*, 53 Fed. Rep. 485.

The Supreme Court of New York, Fifth Department, at

general term, has affirmed the opinion of the special term, in *Pro. v. Hannan*, 30 N. Y. Suppl. 370, holding that under the treaty between the United States and Great Britain, which provides for the extradition of persons, "charged with the crime of murder, or assault with intent to commit murder," a person extradited on a charge of "assault with intent to commit murder" cannot be convicted of an assault with intent to do great bodily harm; See 1 AM. L. REG. & REV. (N. S.) 814; 28 AM. L. REV. 568.

The Supreme Court of Michigan, in *Thompson v. Marley*, 60 N. W. Rep. 976, has held, that when a father, who had been fraudulently induced to execute an absolute deed of his land to one of his children, by representations that that child would hold it in trust for the other children, subsequently executed another deed to that child for the same land, no fraud being used, such child took the land free from any trust in favor of the other children, since, as the fraud used in the procurement of the first deed merely created a resulting trust in favor of the father, the express trust being void as not being in writing, the second deed carried the father's equitable interest.

The Supreme Court of Wyoming has very justly decided, that when a policy of accident insurance requires an action thereon to be brought within one year from the date of the happening of the alleged injury, the limitation begins to run at the date of the death of the insured, and not at the time at which the cause of action accrues: *McFarland v. Ry. Off. & Empl. Acc. Assn. of Indianapolis*, 38 Pac. Rep. 347. The Supreme Court of Wisconsin has improved on this, and asserts that when an accident policy provided that, in case of death or injury, notice of claim should be given to the secretary of the company immediately after the accident, and positive proof of death should be furnished six months thereafter, as a condition precedent; and the insured, a tugboat engineer, disappeared November 9, 1892, and his body was found in the

water near the tugboat April 19, 1893, and notice of death was furnished May 26, 1893, and proof thereof July 12, 1893; it showed a reasonable compliance with the terms of the policy: *Kentzler v. Am. Mut. Acc. Assn.*, 60 N. W. Rep. 1002.

In the opinion of the Supreme Court of Illinois, when an insurance company, by its adjuster, on being requested to rebuild a house destroyed by fire, unconditionally refused to do so, and stated that it would pay the amount of loss when the same was determined by arbitration, the company elected to pay the loss, and waived its right to rebuild: *Platt v. Etma Ins. Co.*, 38 N. E. Rep. 580.

The Supreme Court of North Carolina has lately held, in *In re Sultan*, 20 S. E. Rep. 375, that a resident of North Carolina, who, while in Pennsylvania, procured by false representations a shipment of goods from that place to his residence, and then returned thither, and there received the goods, and was indicted in Pennsylvania for the false representations, is a "fugitive" from justice, and may be surrendered on requisition. This is a correct application to the rule, that a fugitive from justice, within the meaning of the rendition act, is any one, who, having committed the offence with which he is charged in one state, is found in another at the time when it is sought to enforce his criminal liability, irrespective of his motive in leaving the jurisdiction: *In re Cook*, 49 Fed. Rep. 833; *In re White*, 55 Fed. Rep. 54; *Roberts v. Reilly*, 116 U. S. 80; S. C., 6 Sup. Ct. Rep. 291. And it does not matter that he has merely gone to the place of his domicile: *Kingsbury's Case*, 106 Mass. 223.

In the same case, it was also held, that when a warrant of extradition is granted by the governor, the courts will not, on *habeas corpus*, inquire into the motive and purpose of the extradition proceedings, to ascertain whether the object thereof is to punish crime, or collect a debt.

The Supreme Court of Nebraska has laid down the following

rules: (1) That when, on rendition proceedings, a copy of the evidence adduced at the preliminary hearing in the state from which the accused has fled, is attached to the requisition, the court will not, on *Ankeny corpus*, examine into the evidence, to see if it sustains the charge of crime alleged in the information, or whether it supports the finding of the examining court that there was probable cause to believe that the party committed the crime charged; and (2) That in rendition proceedings, an indictment found is *prima facie* evidence that the act charged amounts to a crime; and when a state has adopted criminal procedure by information, and it appears that the person accused has been given a preliminary hearing, been held to answer at a higher court, and an information has been filed in that court, a copy of which is attached to the requisition, such information is of as high a grade, as a criminal pleading, as an indictment, is entitled to the same weight as evidence, and will be so construed: *In re Van Stryver*, 60 N. W. Rep. 1037.

The court last mentioned has also, in conformity with the weight of authority, declared, that when bottles of intoxicating liquor were each inclosed in a paper wrapper or box which was sealed with sealing wax, and a number of these paper boxes, each containing a flask of such liquor, was packed in a wooden box by a party in one state, and shipped to his agent in another state; and the agent opened the wooden box, took out the paper boxes in which the flasks of liquor were contained, and sold them separately;—that the wooden box was the original package, and not the sealed paper box or wrapper, and the flask therein inclosed: *Halcy v. State*, 60 N. W. Rep. 962.

This is the general opinion: *Harrison v. State*, 91 Ala. 62; S. C., 10 So. Rep. 30; *State v. Chapman*, 1 S. Dak. 414; S. C., 47 N. W. Rep. 411; *In re Harmon*, 43 Fed. Rep. 372; whether the boxes are closed or open: *Smith v. State*, 54 Ark. 248; S. C., 15 S. W. Rep. 882. See *Comm. v. Schollenberger*, (Pa.), 27 Atl. Rep. 30; *Comm. v. Zelt*, 138 Pa. 615; S. C., 21 Atl. Rep. 7. The courts of Iowa have held the con-

trary: *State v. Coonan*, 82 Iowa, 400; S. C., 48 N. W. Rep. 921; *State v. Miller*, (Iowa), 53 N. W. Rep. 330; though even there a sale of such bottles over the bar, with permission to the purchasers to open them on the premises, and facilities furnished for drinking the contents, has been held not a sale from the original package: a doctrine utterly inconsistent with the former one: *Hopkins v. Lewis*, 84 Iowa, 690; S. C., 51 N. W. Rep. 255. If, however, the bottles are separately wrapped and labelled, and delivered to a carrier, and the latter, for its own convenience, puts them in a box furnished by itself, and fastened to the floor of the car, so as to be virtually a part thereof, the bottles, and not the box, are then the original packages: *Krith v. State*, (Ala.), 8 So. Rep. 353; and the same rule applies to any box furnished by the carrier without the knowledge of the consignor, whether fastened to the car or not: *Timber v. State*, 96 Ala. 115; S. C., 11 So. Rep. 383.

According to the opinion of ROMER, J., of the Chancery Division, a covenant in a lease not to erect or build on the demised premises, without the written consent of the lessor, "any other building whatsoever," save and except a stable and coach-house, is violated by the erection, without the lessor's consent, above the boundary fence of the premises, of an open trellis-work screen of wood, about fifty-eight feet long and twelve feet high, which interfered to some extent with the light flowing to the ground floor windows of the adjacent premises, held on a lease from the same lessor, with covenants similar to those of the defendant; and that, under the circumstances, the erection was also a breach of a covenant not to do on the demised premises any act, matter or thing, which might be an annoyance or nuisance to any tenant of the lessor: *Wood v. Cooper*, [1894] 3 Ch. 671.

The Supreme Court of Missouri has recently decided, that when an owner of valuable mineral lands makes a lease of them, in consideration that the lessee will establish manufactories thereon, and dig and quarry stone or other mineral therefrom, and of the payment of one dollar

per carload of mineral mined; and the lessee fails to erect manufactories or work the mineral, but, one year thereafter, agrees with several manufacturers not to work the mineral for three years; the lessor may rescind the contract: *Oliver v. Gertz*, 28 S. W. Rep. 441.

The Supreme Court of Oregon holds, that when a libelous article does not name the person alluded to therein, witnesses

Libel. **Person named** may testify, on a criminal prosecution, that, in reading the article, they understood, from their acquaintance with the prosecuting witness and the circumstances alluded to in the article, that it was intended to refer to him: *State v. Mason*, 38 Pac. Rep. 130. So, when a witness testifies that the words used referred to the plaintiff, and that he knew the defendant was talking about the plaintiff, the evidence is sufficient to prove that the words were spoken of the plaintiff: *Dexter v. Harrison*, (Ill.) 34 N. E. Rep. 46. But, when a libelous article is ambiguous, a witness may not state to whom, in his opinion, it refers, but, after simply replying in the affirmative to the question, "Do you know to whom it applied?" may subsequently give facts and circumstances which show who was pointed to by the publication: *Smith v. San Pub. Co.*, 50 Fed. Rep. 399. If the plaintiff's name is used by mistake, there being no intention to refer to him, and the name is not accurately given, there can be no recovery: *Hanson v. Globe Newspaper Co.*, (Mass.), 34 N. E. Rep. 462.

The Court of Appeals of Colorado has reached the just decision that a newspaper article, giving an account of a person's arrest, and stating that he has been guilty of infamous crimes, though published in good faith, is not privileged: *Republican Pub. Co. v. Courcy*, 38 Pac. Rep. 423; See *Democrat Pub. Co. v. Jones*, 83 Tex. 302. An accusation of crime will not be privileged, merely because the person accused is a public official, or a candidate for office: *Upton v. Hume*, (Oreg.), 33 Pac. Rep. 810; *Post. Pub. Co. v. Hallam*, 59 Fed. Rep. 530, affirming *Hallam v. Post. Pub. Co.*, 55 Fed. Rep. 456.

The Court of Appeal of England, in *Mellin v. White*,

[1894] 3 Ch. 276, has lately passed upon a very interesting case of trade libel. *White*, a chemist, was supplied by *Mellin* with "Mellin's Infants' Food," made up in bottles, and labelled. *White* sold it at retail, first affixing to each bottle a notice as follows: "The public are recommended to try *Dr. Vance's Prepared Food for Infants and Invalids*, it being far more healthful and nutritious than any other preparation yet offered." *White* was the owner of *Dr. Vance's* preparation. *Mellin* brought an action for an injunction to restrain *White* from affixing these notices, and adduced evidence to show that his food was much better than *Dr. Vance's*, especially for infants under six months of age; but the case was dismissed by the judge below, after hearing the plaintiff's evidence, without calling on the defendant, on the ground that the defendant's notice was a mere puff of *Dr. Vance's* preparation, and gave the plaintiff no legal ground of complaint. This was held error by the Court of Appeal, for if, on the whole of the evidence, it should appear that the statement contained in the defendant's notice was a false statement about the plaintiff's goods, and to the disparagement of them, and had injured, or was likely to injure the plaintiff, the action would lie.

False statements concerning the goods or business of another are actionable, if special damage results: *Western Co. Manure Co. v. Lawes Chem. Manure Co.*, 9 L. R. Exch. 218. Such are insinuations that goods are spurious: *Thomas v. Williams*, 14 Ch. D. 864; or that a patent is infringed by the articles manufactured by the plaintiff: *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492; See *Grand Rapids School Furniture Co. v. Hancy School Furniture Co.*, 92 Mich. 558; S. C., 52 N.W. Rep. 1009. If the words used are not actionable *per se*, but constitute an untrue statement, maliciously published concerning plaintiff's business, which statement is intended, or is reasonably likely to produce, and in the ordinary course of things does produce a general loss of business, as distinct from the loss of particular known customers, evidence of such general loss of business is admissible, and sufficient to support the action: *Ratcliffe v. Evans*, [1892] 2 Q. B. 524.

The Supreme Court of Rhode Island has lately ruled that when a corporation, being financially embarrassed, places its affairs in the hands of a committee of its creditors, ^{Limitation of Actions} for adjustment and settlement, the payment of a dividend by the committee to a creditor of the corporation, is such a voluntary payment by the corporation as will take the claim of that creditor out of the statute of limitations: *Prudely v. Tenney*, 30 Atl. Rep. 456.

According to a recent decision of the Supreme Court of North Carolina, while, ordinarily, the dismissal of a warrant ^{Malicious Prosecution} by a justice of the peace, with the consent of the party prosecuting, is a sufficient determination of the proceeding to authorize an action for malicious prosecution; yet, when the prosecution is dismissed by an agreement between the parties, by which the party prosecuted is to pay part of the costs, the burden, in an action for malicious prosecution, of showing probable cause, is not thrown on the defendant: *Welch v. Cost*, 20 S. E. Rep. 460.

A discharge by a justice on preliminary examination is a sufficient termination of the prosecution to found an action for malicious prosecution: *Dryfus v. Aul*, 29 Neb. 191; even when he was at first inclined to hold the accused to bail, but discharged him on a promise of good behavior: *Robbins v. Robbins*, 133 N. Y. 597; S. C., 30 N. E. Rep. 977. The same is true of an entry of *nolle prosequi*: *Woodman v. Prescott*, (N. H.), 22 Atl. Rep. 456. But when a magistrate discharges a prisoner without investigation into the merits, and for lack of jurisdiction, and a prosecution is afterwards brought in another county for the same offence, and a *nolle prosequi* is entered with the consent of the prosecutor, and after having the advice of counsel, that, aside from the truth of the charge, the prosecution is likely to fail for the same reason, neither discharge can be considered as a fact from which to infer malice or want of probable cause: *McClafferty v. Philp*, 151 Pa. 86; S. C., 30 W. N. C. 539; 24 Atl. Rep. 1042; and when, after a criminal complaint entered in the supreme court on appeal, a *nolle prosequi* is entered by the

prosecuting officer by the procurement of the defendant's attorney, his discharge, not being ordered by the court, is not such a termination of the prosecution as will enable him to maintain an action for malicious prosecution: *Langford v. Boston & Albany R. R. Co.*, 144 Mass. 431; S. C., 11 N. E. Rep. 697. So, when the justice, instead of committing the prisoner, decided that, though "no wrong was intended, the act was wrong and unlawful," and discharged the prisoner on the latter paying a fine of one dollar and costs, and expressing regret for what he had done, declaring that he intended no wrong, and asking for mercy, the discharge is not sufficient to disprove probable cause: *Hergenruther v. Spidman*, (Md.), 22 Atl. Rep. 1106. If a prosecution for a penalty is settled by agreement of the parties, it is a sufficient termination of the prosecution to found an action: *Sutton v. McConnell*, (Wis.), 30 N. W. Rep. 414.

Kekewich, J., of the Chancery Division, has lately made an interesting ruling on the question of the enforcement of a contract for personal services, in *Deris v. Forrester*, [1894] 3 Ch. 654. In that case, an agreement for the employment of a manager of a business house contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer, however, gave the manager a notice, purporting to determine the agreement and the service created thereby; and the manager thereupon brought an action for an injunction to restrain the employer from acting on the notice. But the court held, that though the clause above mentioned was negative in form, it was affirmative in substance, being equivalent to a stipulation by the employer that he would retain the manager in his employ, and an injunction ought not to be granted.

This case is almost unique, the complaint usually coming from the master. Perhaps the only parallel instance to be found is in *Booth v. Brown*, 62 Fed. Rep. 794, which, however, was decided without reference to this question, the court seeming to

admit that it possessed the power, in a proper case, to relieve the complainants, (strikers discharged from a railroad operated by receivers), though this may be questioned. The circumstances in *Johnson v. Shrewsbury & Birmingham R. R. Co.*, 3 De G., M. & G. 914, were somewhat similar, but not parallel. The analogy with the cases where the master seeks to enforce the service of his employé is complete, nevertheless, and the same rules apply.

The general rule is, that a contract for services cannot be specifically enforced: *Stocker v. Brockelbank*, 3 MacN. & G. 250; nor can this be done indirectly, by an injunction restraining the employé from leaving the service: *Arthur v. Oakes*, 63 Fed. Rep. 310, reversing, *pro tanto*, *Farmer's Loan & Trust Co. v. N. Pac. Ry. Co.*, 60 Fed. Rep. 803. See 1 AN. L. REG. & REV. (N. S.) 865. But if the contract of service contains a negative stipulation, not to perform services for another during the period of employment, that stipulation may be enforced by injunction: *Lumley v. Wagner*, 1 De G., M. & G. 604, affirming 5 De G. & Sm. 485; *Grimston v. Cunningham*, [1894] 1 Q. B. 125; *Duff v. Russell*, 133 N. Y. 678; S. C., 31 N. E. Rep. 622, affirming 16 N. Y. Suppl. 958, & 14 N. Y. Suppl. 134; *Hoyt v. Fuller*, 19 N. Y. Suppl. 962. If, however, the contract contains no negative stipulation, none will be inferred, and an injunction will not be granted. Thus, when the manager of a manufacturing company merely agreed to give his whole time to the company's business during a specified term, the company was held not entitled to an injunction to restrain him from giving, during the term, a part of his time to a rival company: *Whitwood Chemical Co. v. Hardman*, [1891] 2 Ch. 416; disapproving *Montague v. Flockton*, 16 L. R. Eq. 189, which asserted the contrary. See *Fechter v. Montgomery*, 33 Beav. 22. The true distinction would seem to be, as suggested in *Whitwood v. Chem. Co.*, *supra*, that the injunction will only be granted when the employé is one who has a special qualification for the service, and cannot be readily replaced, so that his performing similar services for another would occasion great and irreparable damage to the employer; otherwise not. A sensible middle

course was taken in *Webster v. Dillon*, 3 Jur. (N. S.) 432, where an injunction was granted to restrain an actor from acting at any other theatre during the time that the employer's theatre was ordinarily open for public performances.

The Supreme Court of Pennsylvania, in *Fralick v. Despar*, 30 Atl. Rep. 521, has held, that when an employé has entered

Trade
Secrets into an agreement, prior to entering the service, not to divulge or use any secrets of the business the employer might make known to him, but subsequently leaves the plaintiff's employ and begins the manufacture of similar goods, using plaintiff's secret processes, he will be restrained from so doing by injunction. To the same effect are *Prabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400; S. C., 2 Atl. Rep. 379.

The Supreme Court of Pennsylvania has also decided, that when the husband contracts in his own name for the erection

Mechanics' Liens of a building on his wife's land, and she, with full knowledge of her husband's contract, converses with the contractors in regard to the work, and makes no objection at any time during its progress, she is liable to a *scire facias sur mechanics lien*: *Jobe v. Hunter*, 30 Atl. Rep. 452.

In the opinion of the Supreme Court of Illinois, a tenant in common of a reversion, subject to a life estate, may main-

Partition,
Life Estate tain a suit for partition against his co-tenant before the expiration of the life estate: *Drake v. Merkle*, 38 N. E. Rep. 654. It has been held that there can be no partition *in presenti* between a life tenant and a remainder-man: *Stansbury v. Ingelhart*, 19 Wash. Law Repr. 594; but in Alabama lands may be sold for partition among tenants in common, though the surviving husband of a deceased tenant in common has a life estate in his wife's undivided interest: *McQueen v. Turner*, 91 Ala. 273; and in Missouri the life tenant and a remainder-man may maintain partition against the other remainder-men, though there are contingent estates in the land which may afterwards be vested in persons not *in case*: *Sikemeier v. Galvin*, 27 S. W. Rep. 551.

The same court also holds that the wives of tenants in common are not necessary parties to suits for partition, since their inchoate dower rights are subject to the expectant liability of the loss of their husbands' acisin by partition sale: *Davis v. Lang*, 38 N. E. Rep. 635.

The House of Lords, in *Lovell v. Beauchamp*, [1894] App. Cas. 607, has decided an interesting point in regard to partnership, viz.: That in an action against a firm, of which it appears that one partner is an infant, for goods supplied to the firm, judgment cannot be recovered against the firm simply, but may be recovered against the "defendants other than" the infant partner.

The Supreme Court of the United States, with a display of erudition worthy of a better cause, and even suspiciously elaborate, has solemnly laid down the principle that the United States is at liberty to appropriate and use a patented invention, without any compensation to the inventor: *Schillinger v. United States*, 15 Sup. Ct. Rep. 85. Verily, it is not strange that we are a nation of defaulters and swindlers, when both Congress and the Supreme Court seem to thus disregard the national honor. It is only just to those gentlemen, however, to state that Justices Harlan and Shiras dissented.

According to the Supreme Court of California, an exhibit attached to a complaint, and referred to therein, becomes a part thereof, though the complaint does not expressly make it a part: *Savings Bank of San Diego Co. v. Burns*, 38 Pac. Rep. 102. There is an annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 307.

The Supreme Court of Kansas has lately decided, that when a railroad company procures competent surgeons to attend a brakeman, injured in its employ, and proceeds to transport him to a hospital, in pursuance of the advice and direction of such surgeons, and com-

plies with all their directions as to his safety and care, it is not liable for any mistake, error in judgment, or want of foresight on the part of the surgeons: *Atchison, T. & S. F. Ry. Co. v. Zeiler*, 38 Pac. Rep. 282.

The Supreme Court of Michigan has lately settled a curious complication of affairs in a replevin suit. Both parties were mortgagees, the plaintiff having the prior lien.

Replevin The jury found the value of the property, and that it was wrongfully detained by the defendants. The plaintiff had taken the property into possession, under the writ. The court below directed a verdict to be entered for the defendants to the amount of their lien. This was held error, and that the defendants were not entitled to a money judgment against the plaintiff for their lien, without first tendering to the plaintiff the amount of his prior lien: *Olin v. Lockwood*, 60 N. W. Rep. 972.

The Supreme Court of North Carolina is of opinion, that a statement that a person is a "forger," is not *per se* actionable, when coupled with a charge of some specific act, which of itself does not constitute forgery: *Barnes v. Crawford*, 20 S. E. Rep. 386.

The Supreme Court of New Jersey, in *State v. Mayor of Newark*, 30 Atl. Rep. 543, holds, that if an amendatory statute changes a section of the prior statute, by merely eliminating one of its provisions, the recital at length of the section so amended, in compliance with the constitutional direction, will not be deemed a re-enactment of the provisions which are retained, so as to repeal all laws which are then inconsistent with them. This seems hardly consistent with the ruling in *Pro. v. Wilmerding*, 136 N. Y. 363; S. C., 32 N. E. Rep. 1099, that an amended statute is wholly merged in the amending statute, and if the latter is repealed, the former is not revived, but falls with it. It would be a better statement of the last proposition to say that the amending statute is merged in the one amended, so that the

repeal operates really on the prior statute. See an annotation on the subject of amendments to statutes, in 1 AM. L. REG. & REV. (N. S.) 566.

The Supreme Court of Colorado has ruled, that on an issue as to whether an act was passed in conformity with the constitutional requirements as to procedure, resort

Passage

may be had to the journals of the two houses of the legislature, to ascertain the steps taken by each in its passage: *Robertson v. Pro.*, 38 Pac. Rep. 326. This seems to be the proper doctrine: *Currie v. So. Pac. Ry. Co.*, 21 Oreg. 566; S. C., 28 Pac. Rep. 884; though there are some courts which still ascribe to an act, signed and enrolled, the divinity that cloth hedge a king, (presumably to save themselves labor): *Boyd v. U. S.*, 143 U. S. 649; *Williams v. Taylor*, (Tex.), 19 S. W. Rep. 156. The journals, however, are of value only when they present positive evidence of neglect of constitutional requirements: *Currie v. So. Pac. Ry. Co.*, *supra*; merely negative evidence, by silence, is not enough to rebut the presumption of validity due to enrolment: *Mass. Mut. L. I. Co. v. Colo. Loan & Tr. Co.*, (Colo.), 36 Pac. Rep. 793; unless the constitution requires the omitted facts to be noted: *Ellis v. Ellis*, (Minn.), 56 N. W. Rep. 1056.

The Supreme Court of New Jersey has also held, in *State v. State*, 30 Atl. Rep. 480, that the title of an act, under the constitutional provision that every law shall embrace but one object, and that shall be expressed

Title

in the title, is not only an indication of the legislative intent, but also a limitation upon the enacting part of the law. Therefore, if any parts of the statute are beyond the scope of the title, they must be dropped, if independent, so that the act may stand: *Hendrickson v. Fries*, 45 N. J. L. 555; *Dobbins v. Northampton*, 50 N. J. L. 496; S. C., 14 Atl. Rep. 587; *State v. Becker*, (S. Dak.), 51 N. W. Rep. 1018; but, if the invalid portion of the act appears on inspection to have been an inducement to its passage, the whole act is void: *Trumble v. Trumble*, (Neb.), 55 N. W. Rep. 869.

The Court of Appeal of England has recently given a very

important decision in regard to the use of trade-names, in

Trade Name *Powell v. Birmingham Vinegar Brewery Co.*, [1894]

3 Ch. 449. The plaintiff and his predecessors in trade had for thirty-four years made and sold a sauce, under the name of "Yorkshire Relish," these words being printed upon labels on the bottles, and upon the wrappers. In 1884 the plaintiff registered the words "Yorkshire Relish" as his trade-mark, but in 1893 that trade-mark was, at the instance of the defendants, removed from the register. Down to November, 1893, no sauce but plaintiff's was on the market under the name of "Yorkshire Relish," but about that time the defendants began to place on the market a sauce, which they also described as "Yorkshire Relish." This name was printed on the labels placed on their bottles, and on the wrappers of the bottles, but the labels differed in their general appearance from those of the plaintiff, and there was a statement on both the labels and the wrappers that the sauce was manufactured by the defendants. The plaintiff brought an action to restrain the defendants from passing off, or attempting to pass off, their sauce as his. Upon a motion for an *interim* injunction, evidence was given by a chemist, who had analyzed both sauces, that there was a wide difference between them. It was held, however, that the defendants had not sufficiently distinguished their sauce from plaintiff's, and that an *interim* injunction must be granted, restraining them from using the words "Yorkshire Relish," as descriptive of or in connection with their sauce, without clearly distinguishing their sauce from that made by plaintiff.

A trade-name, to be the sole property of its user, must be either artificial and arbitrary, or have acquired an arbitrary meaning in that connection; and not be merely descriptive of the article manufactured or sold. The inventor of a patented substance, wholly new, who has given it a distinctive name, is not entitled to the exclusive use of that name, after the expiration of his patent, disconnected with any other distinguishing titles, as against other makers of the same articles, (presumably on the ground that it is merely descriptive of that article): *Lindcum & Co. v. Nairn*, 7 Ch. D. 834. But if the

name bears no relation to the subject-matter, it is a good trade-name: *Braham v. Bustard*, 1 H. & M. 447; *Nassau v. Thorley's Cattle Food Co.*, 14 Ch. D. 748; *Montgomery v. Thompson*, [1891] App. Cas. 217. See an annotation on this subject, in 1 AM. L. REG. & REV. (N. S.) 514. But, in any case, though the right to use the name may not be exclusively in the plaintiff, yet, if the defendant's description of his articles is likely to deceive purchasers, and induce them to suppose those articles are made by the plaintiff, the latter is entitled to an injunction, without proof of actual intent to deceive: *Reddaway v. Bentham Hemp Spinning Co.*, [1892] 2 Q. B. 639.

The Supreme Court of Washington has recently held, that it is unlawful for a water company, although a riparian owner at the point of diversion, to deprive other riparian proprietors of the use of a stream, by diverting therefrom, and not returning thereto, large quantities of water; and that the mere facts (1) That a stream of water, flowing into a swamp, spreads out into a broad sheet, with currents, covering a large area of low ground, to which the appellation of swamp or lake has been given; and (2) That a stream, having a bed, banks, and current, has been deepened artificially for drainage purposes, or that it is at times dry; will not deprive it of its character as a water course: *Rigney v. Tacoma Light & Water Co.*, 38 Pac. Rep. 147.

In the absence of statutory provisions, a water company has only the rights of a riparian proprietor; and cannot exercise those rights to the damage of other riparian owners below or above; nor interfere with their exercise of their rights: *Saunders v. Bluefields Waterworks & Imp. Co.*, 58 Fed. Rep. 133; *Barre Water Co. v. Carnes*, 65 Vt. 626; S. C., 27 Atl. Rep. 609.

The Irish Chancery Division has lately uttered an opinion, extremely interesting for its refined technicality, to the effect that when a testator drew a will in his own handwriting, signed it, and subsequently added something also signed, in which he referred to the above as his last

Will,
Execution

will; summoned witnesses into his room, who saw the paper there, signed with the two signatures; acknowledged his signature in their presence, pointing, according to the evidence, to the first signature in doing so, and directed the witnesses to sign opposite that; and thereafter executed a codicil duly attested; the first and third parts of the paper were to be regarded as his will, and the second should be excluded: *Woodroffe v. Crick*, [1894] 1 Ir. R. 508.

In the Chancery Division of England, Stirling, J., has recently decided a noteworthy case: *In re Deakin*, [1894] Construction, 3 Ch. 565. In that case, a testator, by his will, "Relations" gave all his property to his wife for life, and after her death directed the payment of legacies, and gave a moiety of the residue to his wife's "relations," as she might direct. The testator's wife was born out of wedlock, but her parents married after her birth, and had other children; she was always recognized by her parents as their child, and no difference was made between her and her natural brothers and sisters. The testator was aware of his wife's origin, and at the date of his will she was forty-seven years old, and childless. She survived him, and by her will purported to exercise the power in favor of children and grandchildren of her natural brothers and sisters. Under these circumstances, the court held that the word "relations" must be construed as meaning those persons who would have been her relations if she had been legitimate; but that the power was good as to the rest of kin only, and did not include an illegitimate nephew.

As a general rule, if there is nothing in the will to show a contrary intention, the word "relatives" means only legitimates: *In re Saville's Trusts*, 14 W. R. 603; and even when the testator had always treated his two illegitimate children, by a woman whom he afterwards married, as his children, and had none by her after marriage, but left a will by which his property was to be divided among "my children by her," it was held that the illegimates took no interest: *Dorin v. Dorin*, 7 L. R. H. L. 568. This decision, however, is too unjust to require comment, and can hardly be law at the present day. When a testator, in the previous part of his

will, mentioned illegitimates by name as his "cousins," a residuary bequest to his relatives thereinbefore named, was held to include those illegitimates: *In re Jodrell*, 44 Ch. D. 590.

Similarly the word "children," in a will, means *prima facie* legitimate children; but a gift to illegitimate living children as a class may be good, if the words used by the testator clearly show that such children were intended to be objects of his bounty: *Hill v. Crook*, 6 L. R. H. L. 265.

Senfelle, that the word "relations" used in a will means only persons within the statute of distribution: *Gallagher v. Crooks*, 132 N. Y. 338; S. C., 30 N. E. Rep. 746.

THE NEXT NATIONAL ISSUE IN POLITICS.

By C. WETHERILL.

To those who watch the phenomena of a nation of rapid development, nothing can be more interesting than the consideration of the growth of national customs and ideas compared with the development of the laws bearing upon them. The customs are the wisdom of the present time, the laws usually the wisdom of a past age; and in nothing is this more apparent than in the affairs of commerce in the United States. Commercial operations are conducted regardless of state boundaries, great systems of trade carry their debits and credits into every state in the Union, but they do so almost without national protection, or indeed any adequate protection of law. No single state can govern beyond its boundaries, and the powers of the national government are so limited that any attempt on its part to afford an adequate legal protection to the commercial interests of the country are but half way measures, which often seem to do more harm than good. The United States stands alone as an example of a great commercial community operating with a wonderful degree of success, without adequate protection of law.

When, in 1789, the wisest men in America drew up the national constitution, they dealt with the conditions before them, the country was then composed of thirteen small separate communities, the people were poor, the country thinly populated, and each colony was jealous of all the others. Commerce, as now understood, manufactures as now carried on, mining as at present conducted, the present methods of transit of merchandise, men and ideas were absolutely unknown. Each state was unwilling to surrender its independence except so far as the needs of the moment seemed to demand.

They established a central agency for limited purposes and reserved all powers not thus granted to each state respectively. The central agency might legislate only upon the subjects so given to its care: the states legislated, each for itself on all other points, and each state remained sovereign.

The convention, recognizing that their work was but a compromise to supply the needs before them, and foreseeing the confusion which would result from the operation of such a system as the country developed, wisely inserted into the document the invaluable power of amendment by the people themselves.

Since the date of its adoption changes have taken place which could not have been contemplated by the men who drew up that instrument.

By purchase and conquest the area of the country has become enormously extended, and from the survival of the systems of law which prevailed before such annexation, the doctrines of French, Spanish and even of Russian laws have become to a certain extent prevalent in different localities, while the admission of new states into the Union, each one with its own legal and judicial system, has greatly increased the confusion and conflict of law. At the same time the growth of the commercial interests has bound the country more firmly together than it was originally, and the United States are now far more truly united—more truly one country in their interests—than they have ever been before: meanwhile the growth of a system of rapid transit has made it easy for any man who wishes to take advantage of any particular local legislation, to change his habitat, or shift his assets according to the legal requirements of any scheme—wrongful or otherwise—that he may desire to pursue. The present system—or rather lack of system—of law in the United States by reason of its diversity, uncertainty and change, is hindering the development of the legitimate business interests of the country and serves to protect those who are pursuing dishonest schemes; the practical operation of the law, as it now stands, is really less honest than the average citizen.

The above statements are confined to the law bearing on commercial relations, but they are nearly as true considered as to other chapters of the law; and the great demand, the pressing need, of the American people to-day is a uniform system of law for the whole country on all matters of general interest to the citizen, and this should be a national system.

And, as the laws, if made uniform, could not remain so, if the courts enforcing these laws failed to act in unison, a national law could only be properly administered by a national system of courts.

The next great political issue should be upon the abolition of state laws and state courts. All laws within the country should be national, and every court of record should be a court of the United States. But in this connection it is of the first importance to define the meaning of the word "law."

Law is said to be the command of the supreme power in the state relating to the civil conduct of those who are subject to its control, and the national law should deal with all those subjects, the regulation of which is of general interest to the citizens of the country and for these purposes, both for legislative enactment and for judicial and executive enforcement, the fullest and most sovereign power should be vested in the Federal government.

But there are many important subjects of legislation which are not of general interest. It would be impossible for a national government to regulate the details as to the government of cities, the local systems of public education and many other matters of local concern, which are the subjects of regulation in all civilized countries.

These should be the subject of local legislation by ordinance; for ordinance is that which is locally ordained, as distinguished from law, which is supremely commanded; so in a well-established legal system there should be national laws and state, rural and municipal ordinances; but all should be under the protection of, and enforced by a national judicial system.

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WENT JERSEY RAILROAD CO. v. CAMDEN, G. & W. RAILWAY CO.¹ COURT OF CHANCERY OF NEW JERSEY.

A street railway, constructed in a highway under authority of law, with a road-bed which will admit of the free use of the highway by all other lawful means, operated by cars patterned after the style and size of cars ordinarily in use by horse railways, the motive power of which is electricity, supplied by means of overhead wires supported by poles planted in the sidewalks immediately within the curbs, is but a modification of the public use to which the highway was originally devoted, and is not an additional burden on the land, for which compensation may be required.

Equity will not enjoin an unauthorized obstruction in a public highway at the instance of a private person, corporate or natural, who does not suffer some special damage from it differing in kind from the damage which such person sustains merely as a member of the community; and, within this rule, a railroad company, though it does public service, stands substantially upon the footing of a private individual.

Such special damage is not suffered by a steam railway company which has merely the right to operate its road across the highway at grade, through the establishment in the highway of a street railway, the motive power of which is electricity, supplied by means of wires elevated a sufficient height to admit the free passage of the cars of the steam road thereunder.

ELECTRIC RAILROADS UPON PUBLIC HIGHWAYS.

In the desire to facilitate the introduction of improved means of transit by cars running upon the public streets and roads, the rights of the general public, of land-owners, and of the proprietors of other methods of transportation, have not,

¹ Reported in 29 Atl. Rep. 423.

perhaps, always been duly considered by legislative bodies, and it is to the judiciary that the aggrieved parties have looked, and must look for protection and redress.

The rapidly spreading network of poles and wires over the suburban and outlying districts of the great cities, indicates very plainly that, in its local passenger traffic, at least, the steam railroad is finding a dangerous rival.

The "trolley" system has the advantages of cheapness and convenience; it runs upon the public highways, and is not compelled to purchase its right of way; it has obtained a footing as a street railway, with the attendant advantages, while in the rapid course of invention, it bids fair to subserve many of the uses of a steam railway; and, a consummation to be deprecated—we may find in a few years that the camel has thrust his whole body into the hut—that the highways, so carefully guarded against the encroachments of steam railroads, are monopolized by the electric railroad, and that, without any compensation. These considerations make it interesting and important to ascertain, if possible, the present current of judicial opinion.

The decision in the principal case is re-enforced by two others, also decided during the past year, and upon almost identical facts: *Morris & E. Railroad Co. et al. v. Newark Pass. Ry. Co.*, 29 Atl. 184 (N. J.); *Chicago & C. Terminal Ry. Co.* 38 N. E. 604 (Indiana).

The basis of these decisions is, that the right of way acquired by a steam railroad company is impliedly subject to the easement of the public in the street; in other words, that the authority of the railroad to invade the highway is limited to its necessity in crossing; and that, as the operation of a street railway (even by electricity), imposes no additional burden on the street, a street railway company which has acquired proper authority to build so as to cross the tracks of a steam railroad where they intersect a street, may construct its road across such tracks without compensation to the steam railroad company.

The first part of this proposition—that the public easement of passage along the highway is modified only so far as is

absolutely necessary for the purposes of the railroad in crossing—may be conceded—particularly where the railroad acquires its right of crossing only by implication: See *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. E. 205; *Raritan v. Port Reading R. Co.*, 49 N. J. E. 11.

Substantially the same principle was applied in a case recently decided in New York, where a telephone company, operating its lines upon a street by authority of law, sought to restrain the use of the trolley system upon a street railway, on the ground that the escaping current from the trolley wires seriously impaired the usefulness of the telephones: *Hudson River Telephone Co. v. Waterlot Turnpike & Railway Co.*, 135 N. Y. 393 (1892).

The court there said: "The primary and dominant purpose of a street being for public passage, any appropriation of it by legislative authority to other objects will be deemed to be in subordination to this use, unless a contrary intent is clearly expressed. . . . As plaintiff had accepted its franchise, which authorizes it to construct and operate its lines upon streets and highways, upon the express condition that they shall not be so constructed as to incommode the public use, and, as defendant was occupying the streets in such a manner as to expedite public travel and promote the public use to which they were devoted, plaintiff's franchise was of a subordinate character, and it could not complain that the system adopted by defendant interfered with the operation of its lines."

The second part of the proposition, however, presents a different question.

Is it good law to say, without qualification, that a street railway operated by electricity is not an additional burden upon the land of the highway, for which abutting owners are entitled to compensation? The queries in the principal case suggest a necessity for some limitations upon the rule, viz.:

(1) "Whether there may not be methods of operating an electric railway resorted to which will be within the objection that it constitutes an additional servitude."

(2) "Whether serious injury to improvements which the

abutting land-owner may make upo and under sidewalks, by the planting of poles to support the overhead wires, will not be within like objection."

The authorities present, at first glance, little that is enlightening or reassuring to any but the street car companies. Yet, perhaps, a more careful reading would show some grounds for anticipating the adoption of a more satisfactory rule, at no very distant date.

When horse railways were first projected, and long after, it was a debatable question whether their tracks could be built upon the streets without compensation to abutting owners.

But it was finally established by a great preponderance of authority, that the horse railway was only a modification of the public use of the street, and imposed no additional burden on the land: *Brown v. Duplessis*, 14 La. Ann. 842 (1859); *Elliott v. Fair Haven & W. R. Co.*, 32 Conn. 579 (1860); *Cincinnati & S. G. Street Ry. Co. v. Cumminsville*, 14 Ohio St. 523 (1863); *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75 (1864); *Jersey City & B. R. Co. v. Jersey City & C. R. Co.*, 20 N. J. E. 66 (1869); *Hobart v. Milwaukee City R. Co.*, 27 Wisc. 194 (1870); *State v. Laverack*, 34 N. J. L. 201 (1870); *Peddicord v. Baltimore, &c., Pass. Ry. Co.*, 34 Md. 463 (1871); *Paterson Horse R. Co. v. Paterson*, 24 N. J. E. 158 (1873); *Grand Rapids R. Co. v. Heisel*, 28 Mich. 62 (1873); *Attorney-General v. Metropolitan R. Co.*, 125 Mass. 575 (1878); *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. E. 267 (1880); *Eichels v. Evansville Street Ry. Co.*, 78 Md. 261 (1881); *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112 (1886); S. C., 25 Amer. L. Reg. N. S. 431 and note; *Briggs v. Lewiston & Auburn Horse R. Co.*, 79 Me. 363 (1887); *Newark Pass. Ry. Co. v. Block*, 55 N. J. L. 605 (1893); S. C., 27 Atl. 1067.

The words of Magie, J., in *Citizens' Coach Co. v. Camden Horse R. Co.*, *supra*, are significant of the methods of reasoning which first permitted the street car rails to be laid:

"The cars are drawn by animals which usually draw the vehicles used on highways. They carry along the highway such passengers as otherwise would be obliged to pass over it

on foot or in vehicles, and do so with no more injury in the way of noise, jar or disturbance than would be occasioned by the passage of other vehicles: " See also Chancellor Green in *Hinchman v. Ry.*, *supra*.

Had not the public grown accustomed to the use of the streets by horse cars for many years, would the electric cars have received so warm a welcome at the hands of the courts?

If, however, this rule as to horse railways is firmly established, the rule as to ordinary steam railroads is just as well established to the contrary. An ordinary traffic railroad, operating locomotives and trains of cars by steam, is undoubtedly an additional burden upon the highway, and may not be built without compensation to abutting land-owners: *Starr v. Camden & Atlantic R. Co.*, 4 Zabz. 592; *Hetfield v. Central R. Co.*, 5 Dutch. 571; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. E. 75 (1864); *M. & E. R. Co. v. Prudden*, 19 N. J. E. 386 (1868); *Cox v. Louisville N. A. & C. R. Co.*, 48 Ind. 178 (1874); *Penn. S. V. R. Co. v. Walsh*, 124 Pa. 544 (1889); *Western Ry. of Alabama v. Alabama & G. T. R. Co.*, 11 So. 483 (Ala. 1892); 1 *Redf. on Railways* (5th Ed.), 314, *et. seq.*

As was said in *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668 (1890), 19 Atl. 326: " The distinction is often stated as a distinction between steam and horse railroads, but properly it depends not on the power that is used, but on the effect that is produced. A steam railroad is held to impose a new servitude, because, as ordinarily operated, it largely prevents the use of the street in the usual modes. . . . It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. A steam railroad as ordinarily operated, dangerously interferes with the usual modes of travel and is a perpetual embarrassment to them, in greater or less degree, according as its business is greater or less; . . . whereas the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and travel."

There have been cases holding that a steam railway on a street, operated so as to be compatible with the usual modes of

use, would not impose a new servitude: *Morris & E. R. Co. v. Newark*, 2 Stock, 352; *Taggart v. Ry.*, *supra*; *Newell v. Minneapolis Ry. Co.*, 35 Minn. 112; *Fulton v. Short Route Ry. Co.*, 85 Ky. 640.

In the early history of steam railroads, as remarked by Magie, J., in *Citizens' Coach Co. v. Camden Horse R. Co.*, *supra*: "With a limited and imperfect knowledge of the extent of development to which such roads were destined to attain, or with an exaggerated or distorted view of their character as public highways, it was long contended that such railroads might occupy the soil of ordinary public highways without making compensation to the land-owner. . . . It is now perfectly obvious that the use of a public highway longitudinally, by a railroad operated by steam, is a use entirely inconsistent with and destructive of the public use to which the highway was originally devoted."

The courts have been at great pains to define what distinguishes a street railway from an "ordinary railroad."

It seems to be well established that the criterion is neither the motive power, the character of the appliances, nor the location of the railroad.

In numerous cases, the kind of motive power employed has been held to be of no consequence. Thus, in *Williams v. City Electric Street Ry. Co.*, 41 Fed. 556 (Ark. 1890), it was held that steam-motors might be used in propelling street cars. See also *Briggs v. Lewiston & Auburn Horse R. Co.*, 79 Me. 363; *Taggart v. Newport St. Ry. Co.* *supra*; *Halsey v. Rapid Transit Street Ry. Co.*, 47 N. J. E. 380 (1890); *Buffalo R. & P. Ry. Co. v. Du Bois Traction Co.*, 24 Atl. 179 (Pa. 1892).

Finletter, P. J., in a recent case in Pennsylvania, remarked: "What is a railroad, and what is a street railway? . . . Before the establishment of street passenger railways, every one knew what a railroad was. . . . The street passenger railway followed the lines of the streets. It was designed or passengers alone, and received them at all points. It simply took the place of the lines of omnibuses. However a railroad may be now defined, it could not then be mistaken for a

street passenger railway. The character of a structure of any kind must depend upon the purpose it fulfils rather than upon its style of architecture. The method of construction or operation cannot qualify its purpose or character. A street passenger railway will be no less nor more than a street passenger railway, though it may use horse, electric or steam power or the cable. It would still be a street passenger railway if its tracks were sunk below or raised above grade:" *Potts v. Quaker City Elevated R. Co.*, 2 D. R. 200; 3 D. R. 172 (1894); *Commonwealth v. N. E. Elevated Ry. Co.*, 3 D. R. 104 (1893).

Furthermore, it has been recently held in Pennsylvania, that a "street railroad" need not even be upon a street, but may be upon a country road, the court saying that the phrase "street railways," in a general incorporation act, "was used to designate the character of the railway, and not its location; and that the word 'street' includes any highway, unless there is something to restrict its meaning;" *Penna. R. Co. v. Montgomery County Pass. R. Co.*, 3 D. R. 58 (1893).

What is it, then, which distinguishes the street railway? It is a railway, say the courts, which is exclusively for the transportation of passengers, not of goods; and which stops its cars at frequent intervals for the receipt of passengers: *Halsey v. Rapid Transit Co.*, *supra*; *Buffalo R. & P. R. Co. v. Du Bois Traction Co.*, *supra*; *Taggart v. Newport St. Ry. Co.*, *supra*; *Briggs v. Lewiston Ry.*, *supra*; *Potts v. Quaker City Elcv. R. Co.*, *supra*; *Comm. v. N. E. Elevated Ry. Co.*, *supra*; *Penna. R. Co. v. Montgomery Co. R. Co.*, *supra*.

This, it is submitted, is rather a description than a definition. Suppose a horse car line undertook to carry small parcels, would that destroy its character as a street railway? And, how frequent must the stoppages for passengers be?

But, after all, is it necessary, even if possible, to draw the line, and say,—this is a street railway, this is not? And what is gained?

The cases of *Potts v. Railway* and *Commonwealth v. Railway*, *supra*, while they go upon the question whether an elevated railroad operated upon city streets is entitled to

incorporation under a general railroad act, yet show that a road, distinctly fulfilling the description laid down for a street railroad, may yet constitute an additional burthen upon the highway; for surely, nothing could have been farther from the mind of the court than to intimate that such elevated road could be built without compensation to abutting owners. See *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 123 (1882); *American Bank Note Co. v. N. Y. Elevated R. Co.*, 129 N. Y. 252 (1891).

Even after it has been determined, then, that a given method of transportation is a "street railway," this does not necessarily dispose of the further question, is it an additional burthen upon the highway?

The doctrine that a horse railway constitutes no additional servitude having become firmly established, the courts seemed to find it an easy step to electric railroads.

Old charters and statutes authorizing the use of "horse power, steam or other means," were held to permit the use of the electric power, although no such method was known when the charter was granted or the statute enacted: *Hudson River Telephone Co. v. Waterloot Turnpike Ry. Co.* 135 N. Y. 393 (1892); *Patterson Ry. Co. v. Grundy*, 26 Atl. 788 (1893); S. C., 51 N. J. E. 213; *Fox v. Catharine St. Ry. Co.*, 12 Pa. C. C. 180 (1892); *Lockhart v. Craig St. Ry. Co.*, 139 Pa. 419 (1891); *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668 (1890). See *contra*, *People ex rel. Third Ave. R. Co. v. Newton*, 19 N. E. 831 (N. Y. 1889), where the substitution of the cable for horse power was held to impose a new servitude on the street.

It has even been questioned whether "the grant of a right to build a passenger railway . . . does not carry with it, at least, in the absence of specific limitations or prohibitions, the right, from time to time, to operate it by new methods and motive power, developed in the progress of invention and experience:" per Mitchell, J., in *Reeves v. Philadelphia Traction Co.*, 152 Pa. 153 (1893).

It is held in a unanimous array of decisions, that the electric railway is merely a new and improved method of exercise

ing that public easement, long ago determined to be open to horse railways: *Detroit City Ry. Co. v. Mills*, 85 Mich. 634 (1891); *Halsey v. Ry. Co.*, 47 N. J. E. 380; *Koch v. North Avenue Ry. Co.*, 75 Md. 222 (1892); *Taggart v. Newport Ry. Co.*, 16 R. I. 668 (1890); *Buffalo C. & P. Ry. Co. v. Du Bois Traction Co.*, 24 Atl. 179 (Pa. 1892); *Green v. City & Suburban Ry. Co.*, 28 Atl. 626 (Md. 1894); *State v. Mayor*, 30 Atl. 531 (N. J. 1894); *State v. Board of Public Works*, 29 Atl. 149 (N. J. 1894); *Morris & E. R. Co. v. Newark Pass. Ry. Co.*, 29 Atl. 184 (N. J. 1894); *Chicago v. C. Terminal Ry. Co.*, 38 N. E. 604 (Ind. 1894).

At present, it seems to be established that the occupation of the streets by an electric railway using the "trolley" system is no more exclusive than if it were operated by horse power; and that "electricity, besides being as safe and as easily managed as horse power for the propulsion of street cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets, and for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street cars of which horses are the motive power."

And, although a court will take notice that electricity developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when brought in contact with them, it will not take notice that, as used in the trolley system, it is dangerous. Nor is the possible danger in frightening horses so great as to constitute an additional servitude: *Taggart v. Newport Street Ry. Co.*, 16 R. I. 668 (1890); 19 Atl. 326.

Apparently, then, for the mere location of the tracks of such a railway upon a street, and the running of cars thereon, there can be no claim for damages, as for an additional servitude upon the highway.

But the railroad must be properly constructed and maintained. "Those using electricity as a motive power on public highways must remember that they have not the exclusive right to the highway, and must respect the rights of others equally entitled to use it. . . . The company must so con-

struct its tracks and run its cars as not to unnecessarily interfere with the rights of others in the use of this public highway:" *Green v. City & Suburban R. Co.*, 28 Atl. 626 (Md. 1894); See *Koch, et al. v. North Ave. Ry. Co.*, 75 Md. 222 (1892).

A company "cannot lawfully construct and operate its road in a street too narrow to admit of the passage of cars and other vehicles at the same time, nor so construct it as to interfere with the rights of the general public in the street; nor in a street, though of sufficient width, if its condition be such that the operation of the railway will result in the practical exclusion of others from the use of the street: *Detroit City Ry. Co. v. Mills*, 85 Mich. 634 (1891).

When the public authorities have taken possession of a street or highway, and regularly defined the interests and improvements necessary for the use of the public by established grades, etc., lot-owners have the right to make their improvements in reference thereto, and no subsequent change, which obstructs or impairs access to such improvements, can be lawfully made without compensating for the injury. A finding of the court, that such injury will result from laying a street railway track near the sidewalk in front of the owner's house, is in no way qualified or affected by the further fact that when the interests of the company and of the general travelling public are also taken into the account, the location would be as little injurious as in any other part of the highway:" *Cincinnati & S. G. Street Ry. Co. v. Cummins-ville*, 14 Ohio, 523 (1863).

Street cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.

"The plaintiff in error asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands, for passengers carried in such cars, what is called 'rapid transit,' and it draws the inference that its cars may, therefore, be run at such speed as will satisfy this public

demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. . . . I am unable to subscribe to the notion, which, carried to its logical conclusion, would permit this company and other companies running cars in public highways, propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law, to require. . . . There is no just analogy between the right of a street railway running such cars longitudinally along the highway, and the right of a railroad company running its trains across the highway at grade. The latter acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it with an additional easement. . . . No grant for the acquisition and use of such additional easement has been made to the street railways, and in the absence of such grant no right to run cars at excessive rates of speed exists. Their only right in this respect is to run at such rate as will not interfere with the customary use of the highway by others of the public with safety:" *Magie, J., in Newark Passenger Ry. Co. v. Black*, 55 N. J. L. 605 (1893); 27 Atl. 1067.

The location and maintenance of the various appliances of the electric railway, its poles, wires, etc., raise another set of questions; first, what are the special rights of the abutting owners upon public streets; second, do these structures materially interfere with such rights.

It has been stated that the rights of the abutting owner are: (1) The right of access to and from, and over the land designated as a street; (2) The right to light, air and prospect from and over it: *Dill v. School Board*, 20 Atl. 739 (N. J. 1890); *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194 (1870); *American Bank Note Co. v. N. Y. Elevated R. Co.*, 129 N. Y. 252 (1891).

"These are interests distinct from those possessed by the general public, and are rights appurtenant to the lot and the improvements thereon. . . . These he cannot be deprived of without compensation being made to him:" *Putnam Ry. Co. v. Grundy*, 26 Atl. 788 (1893); 51 N. J. E. 213.

"The abutting owner has not only the right of ingress and egress in the accustomed manner, but also to have the way of access to the upper stories of his house kept free from obstructions which will prevent its use in emergent cases, such as fire, or which cannot be quickly displaced without serious danger," for example, an electric wire: *Paterson Ry. Co. v. Grundy*, *supra*.

The owner of a store has no such right to use the street in front thereof by having drays and wagons with teams attached, stand transversely upon the street while discharging goods, as will entitle him to recover against a street railway company which has so constructed its track as to interfere with such use of the street: *Hobart v. Milwaukee City R. Co.*, *supra*.

Since the abutting owner is responsible for the maintenance of the sidewalk before his premises, he is allowed to exercise privileges there which he may not exercise elsewhere in the street, such as loading and unloading goods, maintaining vaults, chutes, etc.

And, on the other hand, the roadway having been devoted to passage by vehicles, may lawfully be applied to uses which would be unlawful if exercised upon the sidewalk, against the will of the abutting owner. For example, the erection of trolley poles in the middle of the street does not entitle the abutting owners to compensation, whatever might be the case if they were erected upon the sidewalk: *Halsey v. Rapid Transit Street Ry. Co.*, 47 N. J. E. 380 (1890).

The general rule seems to be that, "recognizing the right of the legislature and city authorities to authorize the building of railways upon the streets of a city, without compensation to property owners, the necessary and proper apparatus for moving them must be allowed to follow as an incident, unless there is something illegal in its construction and use:" *Lockhart v. Craig Street Ry. Co.*, 139 Pa. 419 (1891); *Fox, et al. v. Catharine Street Ry. Co.*, 12 Pa. C. C. 180 (1892).

And the poles and wires of the trolley system come within this description of necessary and proper apparatus: *Halsey v. Rapid Transit Ry.*, *supra*; *State v. Mayor, &c.*, 30 Atl. 531

(N. J. 1894); *Taggart v. Newport St. Ry. Co.*, *supra*. See *Fidelity Trust Co. v. Mobile Street Ry. Co.*, 53 Fed. 687 (1892).

So, stringing a single wire along a street, twenty feet above the surface, cannot be said to be any substantial interference with the *quasi* easement of light and air: *Paterson Ry. Co. v. Grundy*, 51 N. J. E. 213 (1893).

Nevertheless, "a privilege granted to a corporation of a partial use of the public highway, which threatens, if it does not encroach on the property rights of the adjacent owner, should be so exercised by the company as to minimize the inconvenience and danger to the enjoyment of such rights." If the wire can, without serious impairment of its usefulness, as well be hung in the middle of the street as on the curb line, it must be so hung: *Paterson Ry. Co. v. Grundy*, *supra*.

And the poles must be so placed as not to interfere with the rights of ingress and egress: *Detroit City Ry. Co. v. Mills*, 85 Mich. 634 (1891).

The vigorous dissenting opinion of McGrath, J., in the last named case, sets forth vividly the evils attendant upon the use of the trolley system. He strikes at the root of the whole matter by denying any distinction, except in degree, between horse and steam railways, and maintains, in the face of accumulated authority, that even a horse railway is an additional burthen upon the land, for which compensation ought to be made in proportion to the damage inflicted: See also *Craig v. Rochester City R. Co.*, 39 Barb. 494 (1862); Lewis on Eminent Domain, Chap. 5, § 124.

In *Chicago & C. Terminal Ry. Co. v. Sterling H. & E. C. Street Ry. Co.*, 38 N. E. 604 (1894), the court intimated serious doubts of the wisdom and justice of the established rule as to street railways, but felt themselves constrained to follow the time honored doctrine.

Perhaps, so radical a position as that assumed by the dissenting judges, in *Detroit City Ry. Co. v. Mills*, is unnecessary, although those opinions are worthy the most careful consideration.

But, to admit in its entirety, the rule for which they con-

tend, would be to unsettle long established rights, and might well lead to a worse state than the first.

Rather, in the future, we may hope for decisions following out the lines suggested by the queries of the principal case; casting aside the unserviceable and hitherto unsuccessful attempt to define that variable article the "street railway;" and declaring that each case, as it arises, must stand upon its own facts, and that when *any* method of transportation, no matter what its form or name, is operated upon a highway, and interferes to any material degree with the legal rights of others—the public, the land-owners, or other railway companies—such interference must be compensated in damages.

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HART, APPELLANT, v. THE CITIZENS' INSURANCE CO. OF
PITTSBURG, RESPONDENT.¹ SUPREME COURT OF WISCONSIN.

Where an insurance policy provides that no action thereon for the recovery of any claim shall be sustained, "unless commenced within twelve months next after the fire," the time limited begins to run from the date of the fire, and not from the time when the liability is fixed, and the right of action accrues.

LIMITATION OF ACTIONS WITH REFERENCE TO INSURANCE CONTRACTS.

The general statutes of limitations of the several states require or permit an action to be brought on contracts within a specified time, and not thereafter. Various periods are prescribed by the different laws for the bringing of actions on different kinds of contracts, whether in writing or not. The period, within which contracts in writing must be sued on, is generally longer than in instances of verbal agreements, and, in some states, if the obligation or undertaking is under seal, or is a bond, the time, within which an action may be brought, is even longer than in cases of ordinary written contracts. The various statutes of limitation usually provide that actions on written contracts must be brought within five years and on verbal contracts within three years from the accrual of the right of action. The period of limitation prescribed by contracts of insurance, however, is usually either six or twelve

¹ Reported in 86 Wisc. 77.

months from the time of the loss, death, accident, etc., as the case may be. While there may be instances, in which an insurance company would be liable on an oral contract entered into between the assured and an agent of the company authorized to bind it, as where the agent agreed with the assured that the company should be bound from a certain time, the rate, amount, etc., being agreed upon and understood, but for the delay of the agent the policy is not written and delivered till after the loss. Contracts of insurance are almost uniformly evidenced by an undertaking in writing. The general statute, we will say, limits the time of bringing an action on a written obligation to five years. The contract of insurance, however, on the other hand, expressly stipulates that no action shall be brought, nor recovery had, unless suit be instituted within a year, or six months from the time of the fire, death, accident, etc., etc. But the insurance contract is supposed in law to reflect the identical agreement and undertaking between the parties, as well as all conditions precedent, which may be embodied therein, and when it is stipulated in the contract of insurance that no action shall be brought except within twelve months next after the loss, no action can thereafter be brought, as a general rule, notwithstanding the provision of the general statute of limitation that it may be brought within five years. The express contract of the parties and the stipulations to which they agree in that contract, supplants, for the purposes of an action on the policy, the general statute of limitations. From an early time in the history of the jurisprudence of this country, the courts have adopted and adhered to this holding in a uniform and unbroken line of decisions, which hold the limitation in the policy to a shorter time than the general statute, valid and binding: *Fullman v. Ins. Co.*, 7 Gray, 61; *Cray v. Ins. Co.*, 1 Blatchf., 280; *O'Laughlin v. Ins. Co.*, 11 Fed. Rep. 281; *Moore v. Ins. Co.*, 72 Iowa, 414; *Virginia Fire & Marine Ins. Co. v. Wells*, 83 Va. 736; *Riddlesbarger v. Ins. Co.*, 7 Wall. 386; *Vette v. Ins. Co.*, 30 Fed. Rep. 668; *Thompson v. Ins. Co.*, 25 Fed. Rep. 296; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11; *Tasker v. Ins. Co.*, 58 N. H. 469; *Brown v. Ins. Co.*,

5 R. I. 394; *Woodbury Savings Bank v. Ins. Co.*, 31 Conn. 517; *Chambers v. Ins. Co.*, 51 Conn. 17; *Wilkinson v. Ins. Co.*, 72 N. Y. 499; *Merchants' Mutual Ins. Co. v. Lacroix*, 35 Tex. 245; *McFarland v. Ins. Co.*, 6 W. Va. 425; *Virginia Fire & Marine Ins. Co. v. Aikin*, 82 Va. 424; *Suggs v. Travelers' Ins. Co.*, 71 Tex. 579. Indeed, so uniform and unbending is this holding of the courts that, though the parties to whom the loss may be payable are infants and incapable of suing, unless, perhaps, by guardian, *prochein ami*, or in other representative capacity, they will be bound by the stipulation in the policy: *O'Laughlin v. Ins. Co.*, 11 Fed. Rep. 280; *Suggs v. Ins. Co.*, 71 Tex. 579.

And where it was stipulated in the policy that no action should be sustained unless brought within twelve months, and a suit was commenced within the twelve months, but failed without fault of the assured, it was held, nevertheless, that another action could not be begun after the expiration of the year: *Wilson v. Ins. Co.*, 27 Vt. 99. Nor will the fact that a statute of a state, which permits a new action to be brought on the same contract at any time within a year after a non-suit suffered in the first action, change the rule. Such a statute existed in Missouri, and an action was commenced by a policy-holder in that state in apt time, but was dismissed by the plaintiff of his own motion. He brought a new action on the same policy within a year after the voluntary dismissal, and sought to excuse the delay in bringing suit by reason of this statute. But it was held that the stipulation in the policy that the action should be brought not later than a year from the loss, controlled, and that assured could not rely on the limitation of one year after the non-suit within which to sue: *Riddlesbarger v. Hartford Fire Ins. Co.*, 7 Wall. 386.

The question whether the limitation period shall be construed to commence from the date of the fire, death, etc., strictly speaking, or whether it shall be held to begin to run only after the accrual of the cause of action under the terms of the contract of insurance, is one upon which the courts are very much divided. The following cases hold that the limitation period does not begin to run until a cause of action arises

under the contract: *Mayor, etc. v. Ins. Co.*, 39 N. Y. 45; *Mather v. Ins. Co.*, 89 N. Y. 315; *Fireman's Fund Ins. Co. v. Buckstaff* (Neb.), 56 N. W. R. 697; *Steel v. Ins. Co.*, 51 Fed. 715; *Cooper v. Mut. Accident Assn.* 57 Hun. 407; *Barber v. Ins. Co.*, 16 W. Va. 658; *Hong' Sing v. Ins. Co.*, 8 Utah, 235; *Matt v. Ins. Co.*, 81 Iowa, 135; *Chandler v. Ins. Co.*, 21 Minn. 85; *Hay v. Ins. Co.*, 77 N. Y. 607; *German Ins. Co. v. Davis* (Neb.), 59 N. W. R. 698; *McConnel v. Ass'n.*, 79 Iowa, 757; *Spare v. Ins. Co.*, 17 Fed. 568; *Vette v. Ins. Co.*, 30 Fed. Rep. 668; *Hart v. Ins. Co.*, 86 Wis. 77; *Frisen v. Ins. Co.*, 30 Fed. Rep. 352; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Hiller v. Ins. Co.*, 70 Iowa, 704; *Sun Mutual Ins. Co. v. Jones*, 54 Ark. 376.

The following very respectable list of authorities hold, with much sound reasoning and good logic, that the limitation begins to run from the time stated in the policy, and not from the time of the accrual of the cause of action: *Virginia Fire & Marine Ins. Co. v. Wells*, 83 Va. 736; *Ghis v. Ins. Co.*, 65 Minn. 532; *Roach v. N. Y. & E. Ins. Co.*, 30 N. Y. 546; *Ripley v. Ins. Co.*, 30 N. Y. 136; *McElroy v. Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *Johnson v. Ins. Co.*, 91 Ill. 92; *Fullman v. Ins. Co.*, 7 Gray (Mass.). 61; *Travellers' Ins. Co. v. Ins. Co.*, 1 N. D. 151; *Cray, Recr. v. Ins. Co.*, 1 Blatchf. 280; *Meesman v. Ins. Co.* (Wash.), 27 Pac. Rep. 77; *Grigsby v. Ins. Co.*, 40 Mo. App. 276; *Williams et al. v. Ins. Co.*, 27 Vt. 99; *Lents v. Ins. Co.*, 96 Mich. 445; *N. W. Ins. Co. v. Phoenix O. & C. Co.*, 31 Pa. 448; *Farmers' Mut. Ins. Co. v. Barr*, 94 Pa. 345; *Steel v. Phoenix Ins. Co.*, 47 Fed. Rep. 863; *Waynesboro Fire Ins. Co. v. Conover*, 98 Pa. 384; *Chambers v. Ins. Co.*, 51 Conn. 17; *McFarland v. Ry. O. & E. Accident Assn.* (Wyo.), 38 Pac. Rep. 347; *King v. Watertown Ins. Co.*, 47 Hun. 1; *Thompson v. Phoenix Ins. Co.*, 25 Fed. Rep. 296; *Garido v. Ins. Co.*, 8 Pac. Rep. 512; *Tasker v. Kenton Ins. Co.*, 58 N. H. 496. The courts of New York have not been at all uniform in their own decisions on the question. They seem to have in some cases adapted a strained construction of the particular wording of policies to justify the contrary decisions. The case of *Cooper v. U. S.*

Mut. Ben. Assn., 132 N. Y. 334, decided in 1892, was an action on an accident policy which undertook to pay the beneficiary in the policy a certain sum in case of injury to the person, and in case of death of the assured, the Association was to pay a specified sum to his wife. The policy provided that no suit should be commenced unless within one year next after the injury. It was held that the widow, who was only entitled to maintain an action in case of the death of the assured, could maintain it on the policy for the death within one year from the time the assured died, though such period be more than a year from the happening of the injury which caused death. This ruling is reasonable, however. The policy provided that if assured should die in 90 days that the wife should recover. The assured, under the policy, was also entitled to certain indemnity whether the accident proved fatal or not. The wife was only entitled to indemnity in the event it did. Thus there were two beneficiaries under the same policy. The assured himself was entitled to indemnity from the moment he was injured; the wife not till his death. The wife could not proceed to furnish proofs of loss under the policy until the death of the husband. The husband could, however, just as soon as injured. The fundamental rights of the two beneficiaries in the policy are, by its terms, and the possible results of the accident, placed at divergent times. In the case of *Steen v. Ins. Co.*, 89 N. Y. 315, the policy required actions to be brought within twelve months after the "loss or damage shall accrue." This clause in a policy would doubtless justify the decision that the action could be commenced within one year after the accrual of the cause of action, as all provisions in a policy which are of doubtful construction are construed strictly toward the insurer, and liberally in favor of the assured: *Vette v. Ins. Co.*, 30 Fed. Rep. 668; *Bradley v. Ins. Co.*, 28 Mo. App. 7; *Mayor, etc. v. Ins. Co.*, 39 N. Y. 35; *Grant v. Ins. Co.*, 5 Ind. 23; *Sun Mutual Ins. Co. v. Jones*, 54 Ark. 376. And the policies sued on in the cases of *Mayor v. Ins. Co.*, 39 N. Y. 45 and *Hay v. Ins. Co.*, 77 N. Y. 235, contained a clause similar to the one considered in *Steen v. Ins. Co.*, *supra*. Besides

the court seems, in this latest case on the subject, to approve the case of *King v. Ins. Co.*, 47 Hun 1, which holds that the limitation begins to run from the time of the loss. In the case of *Blather v. Ins. Co.*, 89 N. Y. 315, the court held, disapproving the cases of *Johnson v. Ins. Co.*, 91 Ill. 93 and *Fullman v. Ins. Co.*, 7 Gray (Mass.), 61, that the limitation began to run, not from the time of the loss, but from the accrual of the action. Thus it would seem at least a little difficult to reconcile all the New York decisions on this point. In *Hay v. Ins. Co.*, *supra*, the policy provided that no action should be maintained unless within a stipulated time from the "loss." The court seems to play upon this word, and finally construes the policy to mean that it shall be sued on not later than a certain time from the accrual of the cause of action thereunder, instead of from the loss, as the policy plainly says in unambiguous and simple language. The supreme court of Arkansas has adopted this construction, following the New York court. The case of *Johnson v. Ins. Co.*, *supra*, though assailed by the New York court, has been expressly approved in the late cases of *McElroy v. Ins. Co.*, 48 Kan. 200; *McFarland v. Ry. O. & E. Acc. Assn.* (Wyo.), 38 Pac. Rep. 347; *Virginia Fire & M. Ins. Co. v. Wells*, 83 Va. 736, and is in harmony with the case of *Riddlesbarger v. Ins. Co.*, 7 Wall. 386, and the many other cases herein cited as sustaining the proposition that the limitation begins to run from the time the policy says instead of the accrual of the action. In the case of *Thompson v. Ins. Co.*, 25 Fed. Rep. 296, the court held that the limitation began to run from the date of the fire, unless the assured was prevented in some way by the insurer from bringing the action in apt time. The case went to the Supreme Court of the United States where it was held that the failure to bring the action within the time limited would excuse the failure to bring it sooner, if the insurer led assured to believe the claim would be paid without suit: *Thompson v. Ins. Co.*, 136 U. S. 287. On remanding the case by the United States Supreme Court, it was again tried in the Circuit Court. That court again adhered to its former ruling that the limitation period began to run from the date of the fire. It

held further, that the insurer had not induced the assured not to sue except for five months of the twelve provided in the policy within which to sue, and the court held this seven months left ample time in which to sue, and that the assured did not commence his action in time, it having been more than the twelve months after the fire. This last decision was reversed by the Circuit Court of Appeals for the Ninth Circuit, the court holding that a delay in suing on the contract of insurance for more than a year, which was superinduced by the representations of the agents of the company that the claim would be settled without a resort to the courts, was excusable when caused by such representations: *Steel v. Ins. Co.*, 51 Fed. Rep. 715.

The Supreme Court of Nebraska, with the Supreme Court of Arkansas, and perhaps some other courts, seems to take the position that all the six or twelve months, as the case may be, may be taken up in making proofs of loss and complying with the conditions precedent contained in the policy. But if the assured can consume a whole year in preparing proofs of loss which, according to the stipulation in the policy, must be furnished within sixty days, and which stipulation all courts hold and agree to be a condition precedent to any recovery at all, when made such by the policy, why can he not consume more than a year, or two years, or three, or an indefinite time? Yet he unquestionably must furnish these proofs as required by the policy, in manner and form laid down by the insurance contract itself, or he must be forever and all time barred from maintaining any action thereon: *Bowlin v. Ins. Co.*, 36 Minn. 433; *Shapiro v. Ins. Co.*, 51 Minn. 239; *Gould v. Ins. Co.*, 90 Mich. 302, affirmed on rehearing, *Id.* 308; *Steel v. Ins. Co.*, 93 Mich. 81, and many other cases that might be mentioned.

It is difficult to see how the courts can call the time of the loss mentioned in the policy the time of the accrual of the cause of action thereon. Surely, if the parties had intended so simple and commonplace a word as loss to mean the time of accrual of a cause of action, they would have embodied the latter term in the contract, instead of the simple word "loss,"

which has a plain, popular, commonplace and unambiguous meaning, and is nowhere defined by any of the standard lexicographers to mean the accrual of a cause of action. But it is argued by some of the courts that all the provisions of the policy must be taken together, and the policy construed as a whole. But, taking this horn of the dilemma places such an argument in no better attitude. Suppose a policy provides that the action shall not be brought till sixty days after the fire, and not later than one year therefrom. Construing these provisions together, the suit must not be brought sooner than the sixty days, nor later than the twelve months, or, in other words, must be brought within the ten months that elapses after the furnishing of the proofs and before the expiration of the year. There is nothing unreasonable in such a requirement. A clause limiting the time within which to bring the action to six months has never been held unreasonable, and has often been held valid, though the assured must furnish the proofs of loss within sixty days after the fire. A number of cases to this effect may be found in the authorities cited to sustain the limitation in its strict and plain terms.

In the case of *Johnson v. Ins. Co.*, *supra*, the Supreme Court of Illinois, with much good sense and sound reason in discussing the question of the time of the occurring of the loss, say: "When did the loss occur? Manifestly at the time the fire destroyed the property. In what consisted the loss? Obviously in the destruction of the building by fire. We are wholly unable to perceive that language could have been used that could have rendered the meaning plainer." In *Bradley v. Ins. Co.*, 28 Mo. App. 7, the court say: "When did the loss occur? Certainly, on the day, at the instant, when the property was destroyed by fire. The term employed in the contract is apt and unambiguous." The policy in the case provided that no action should be brought on the policy unless within six months next after the loss should occur. The Supreme Court of Connecticut discussed the same question where a policy was sued on, containing the provision that an action should be brought to recover thereon within "twelve months next after any loss or damage shall occur."

The court, in passing upon this clause of the policy, say: "This limitation is lawful and reasonable. In words of common use and plain meaning, an event is referred to as a starting point, that is, the destruction or injury to plaintiff's property by fire. It is certain they intended to surrender a very large portion of the time allowed them by law; and there is nothing either in the structure or the subject matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant and the institution of the suit. The contract keeps the day upon which a fire occurs entirely distinct from the day upon which the right to sue for indemnity accrues. Each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement:" *Chambers v. Ins. Co.*, 51 Conn. 17. And the Supreme Court of Virginia, in considering an action on a policy which stipulated that "No suit or action shall be maintained in any court upon this policy unless the same be instituted within six months next succeeding the day upon which the loss or damage is alleged to have taken place," among other things, said: "It is undeniable that a policy must be construed with reference to all its provisions like any other contract. And it may not be gainsaid that the condition of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that when the terms and stipulations of a contract are plain and clear, we are bound to adhere to the terms, as the only authentic expression of the intention of the parties. None would be rash enough to claim that there is obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next succeeding the time when the loss is alleged to have taken place. The position is that the sixty days in which the company is entitled to delay the payment of the

loss incurred by the fire should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so as to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in its terms, to indicate any such intention: " *Va. Fire & M. Ins. Co. v. Wells*, 83 Va. 736. The conclusions of these courts evince sound reason, common sense and good logic and are in harmony with the best considered cases and the clear weight of authority. The loss of the property is that which is insured against, not the production of the proofs of that loss. The insurer is not, in law, supposed to lose anything. The loss to the assured by reason of the fire is the loss in every proper sense. The insurer for a valuable consideration undertakes to pay the assured the loss by fire sustained. It is in a sense a guarantor, and binds itself to indemnify the assured against loss. The contract of insurance, the payment of the premium, and the loss by fire, or the accident, etc., are the fundamental elements of liability. The furnishing the proofs of loss is only an initial step to be taken looking to an action. This can and must be done in a certain time. And if, after the proofs of loss are furnished, and the other conditions precedent of the policy are complied with on the part of the assured, and there remains a reasonable time before the expiration of the stipulated limitation period in the policy for bringing the action, the assured will be required to take advantage of that opportunity, or his claim must be adjudged forever barred. No court, certainly, would close its doors to the litigant who has been as diligent as a reasonable person could be required to be in complying with conditions precedent in his policy, and, in spite of this due diligence, the limitation clause has elapsed. In cases of this kind the courts would not hesitate to hold that, the assured having done all that could have been required of him and used proper diligence to get his claim in apt condition for a suit, will be entitled to maintain it, and against such a suitor, the doors of justice never should be closed. In harmony with this principle, it has been held that where the last day of the limitation prescribed by the contract falls on Sunday, the assured will be

permitted to maintain his action if begun on the Monday following: *Owen v. Howard Ins. Co.*, 87 Ky. 571. See, also, *Edmonson v. Wragg*, 104 Pa. 501; *L. R. & Ft. S. Ry. v. Dean*, 43 Ark. 529.

Sometimes it is not an easy matter to ascertain with precision, the exact time when the cause of action under an insurance contract accrues. This inquiry may be of much importance, too, in those jurisdictions where it is held that the limitation period does not begin to run until the cause of action first accrues. To avoid any doubt or difficulty, the prudent practitioner will bring his actions in seasonable time; but this is not always done, and it then is necessary often to stretch the terms of the policy all they will admit, in order to show a right to come into court at all. Thus, where the insurer flatly denies any liability whatever, and unconditionally refuses to pay the loss alleged to have been sustained, this will place the company and the assured at arms length, as it were, and the cause of action, if well founded in fact, will become mature at once. The limitation period will then be set in motion, and it becomes the duty of the insured to proceed at once with his action. After such renunciation by the company of any liability, he cannot then wait and make his proofs of loss at any time within the sixty days, because these are dispensed with by reason of the general denial of liability. Upon such general repudiation of any liability by the insurer, the right of action is complete, and the period of limitation begins to run: *Hartford Fire Ins. Co. v. Josey* (Tex.), 25 S. W. R. 685; *Allegre v. Ins. Co.*, 6 H. & J. 408; *Taylor v. Mercantile F. Ins. Co.*, 9 How. 390; *Daniker v. Grand Lodge A. O. U. W.* (Utah), 37 Pac. R. 245; *Lazensky v. Supreme Lodge Knights of Honor*, 31 Fed. R. 592; *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696; *Continental Ins. Co. v. Chew*, (Ind.), 38 N. E. R. 417; *German Ins. Co. v. Frederick*, 58 Fed. R. 144; *Vankirk v. Ins. Co.*, 79 Wis. 627; *Phoenix Ins. Co. v. Barchelder*, 32 Neb. 490; *German Ins. Co. v. Gibson*, 53 Ark. 494; *California Ins. Co. v. Gracie*, 15 Colo. 70; *Phoenix Ins. Co. v. Weeks*, 45 Kan. 751; *Steamship Samana v. Hall*, 55 Fed. R. 663; *Hahn v. Ins. Co.*, 23 Ore. 576; *Savage v.*

Ins. Co., 12 Mont. 458; *Shannon v. Ins. Co.*, 83 Wis. 507; *Sepp v. Ins. Co.*, 37 S. C. 417; *Dial v. Ins. Co.*, 29 S. C. 560; *Weiss v. Ins. Co.*, 23 Atl. R. 991; *Lebanon Mut. Ins. v. Erb*, 112 Pa. 149; *Young v. Ins. Co.*, 92 Mich. 68; *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631; *American Central Ins. Co. v. Sweetser*, 116 Ind. 370; *Niagara Ins. Co. v. Lee*, 73 Tex. 641; *Com. Union Ins. Co. v. Scammon*, 12 N. E. 324; *Kansas Protective Union v. Whitt*, 14 Pac. R. 275; *Unsell v. Ins. Co.*, 32 Fed. R. 443; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285; *German Ins. Co. v. Gueck*, 130 Ill. 345; *Sun Mut. Ins. Co. v. Mattingly*, 77 Tex. 162. The courts have uniformly held that the requirements of proofs of loss; to submit to arbitration; to furnish certificate of a magistrate or officer; and, in short, that any or all the conditions precedent prescribed in the policy, are for its advantage; and, if it chooses to do so, it may waive them or any of them. When they are so waived, they become, for all purposes of the bringing of an action after the waiver, just as though they had never been incorporated into the contract of insurance: *Gooden v. Ameskeag Fire Ins. Co.*, 20 N. H. 73; *McFarland v. Ins. Co.*, 6 W. Va. 425; *Mickry v. Ins. Co.*, 35 Iowa, 174; *Veile v. Ins. Co.*, 29 Iowa, 9; *Georgia Home Ins. Co. v. Kinners*, 28 Gratt. 88; *Gaus v. Ins. Co.*, 43 Wis. 108; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Grant v. Ins. Co.*, 5 Ind. 23; *Coursin v. Ins. Co.*, 46 Pa. 323; *McFarland v. Ins. Co.*, 134 Pa. 590; *Keenan v. Ins. Co.*, 12 Iowa, 126; *Hartford Fire Ins. Co. v. Davenport*, 37 Mich. 609; *Jennings v. Ins. Co.*, 148 Mass. 61; *St. Paul F. & M. Ins. Co. v. McGregor*, 63 Tex. 399; *Home Ins. & B. Co. v. Meyer*, 93 Ill. 271; *Continental Ins. Co. v. Chew* (Ind.), 38 N. E. R. 417; *Hridenreich v. Ins. Co.* (Ore.), 37 Pac. R. 64; *Merchants Ins. Co. v. Gibbs*, 29 Atl. 485; *Western Home Ins. Co. v. Richardson* (Neb.), 58 N. W. R. 597; *Trippe v. Prov. Fund. Soc.*, 140 N. Y. 23; *Enos v. Ins. Co.* (S. D.), 57 N. W. R., 919; *Vergeront v. Ins. Co.*, 86 Wis. 425; *Emory v. Ins. Co.*, 88 Cal. 300; *Bromberg v. Ins. Co.*, 45 Minn. 318; *Mordy v. Ins. Co.*, 85 Mich. 210; *Waiver v. Ins. Co.*, 153 Mass. 335; *Continental Ins. Co. v. Wilson*, 45 Kan. 250; *Green v. Ins. Co.*, 84

Iowa, 135; *Wright v. Ins. Co.*, 12 Mont. 474; *Carpenter v. Ins. Co.*, 135 N. Y. 298; *Star U. L. Co. v. Finney*, 35 Neb. 214; *Fisher v. Ins. Co.*, 33 Fed. R. 544; *Travellers Ins. Co. v. Harvey*, 5 S. E. R. 553; *Continental Life Ins. Co. v. Rogers*, 19 Ill. 474, and many other cases.

But the courts will not construe every suggestion that the company may make to the assured to be an unqualified waiver of all the conditions precedent. For instance, it may be objected by the insurers that the proofs of loss have not been furnished in apt time; that they are not sworn to as required; that there is no certificate of the nearest magistrate as to the loss; that immediate notice of loss was not given as required; that there was fraud in procuring the insurance; that there were false answers to questions in the application upon which the insurance was based. An objection of this kind would doubtless be a waiver of any other similar defence not specified. But any number of such objections could not be held to be a waiver of the clause requiring suit to be brought within a year, because there would be nothing in such objections leading to the assured to believe that such a stipulation would not be insisted upon, and for the further reason that in the very nature of things, this limitation stipulation would not be waived unless the assured at the trial failed to set it up as a defence. It has until the time of trial to plead this in bar. Every one of these objections could be made before the time of bringing suit expired. But such objections would doubtless waive a stipulation that the proofs of loss were not furnished within the time specified, or that they were not full and complete, or that there had been no arbitration, etc. Generally, the requirements to submit more perfect proofs of loss, or some other objection to the non-compliance with a condition precedent to a right to sue, could in no way affect the right of the insurer to set up the limitation period, or false swearing, or fraud in procuring the insurance, or any breach of the warranties in the application or policy. These go to the foundation of the action. They are matters of defence that will not be considered waived unless it clearly appear from the facts that the company has done or omitted some act which

may have induced assured, acting with reasonable prudence, to have relied on the assumption that the company would not plead or set up such defence. And if the conduct of the company in connection with a loss under its policy be such as to justify any one of ordinary intelligence in believing that the claim will be settled without a suit, and, relying on this representation, the assured defers bringing his action until after the period of limitation expires, the action may nevertheless be maintained within a reasonable time thereafter: *St. Paul Fire & M. Ins. Co. v. McGregor*, 63 Tex. 399.

In *Home Ins. & Banking Co. v. Meyer*, 93 Ill. 271, suit was brought on a policy within the time prescribed. The company after the action was begun promised repeatedly to pay the loss, insisting that there was no need to resort to the courts to enforce collection. The suit was pending for about two years, and finally dismissed for want of prosecution. Like promises were made by the company after the suit had been dismissed for want of prosecution. An action was subsequently brought on the same policy, and it was held that the promises and assurances of the company that the claim would be paid without suit were a sufficient excuse, not only for the failure to prosecute the first action, but for not bringing the last within the limitation period as well. But the mere fact that there may be negotiations carried on between the parties looking to a settlement will not toll the limitation period stipulated in the contract of insurance, unless there be an express agreement that the limitation be suspended pending the negotiation: *Gooden v. Ins. Co.*, 20 N. H. 73; *McFarland v. Ins. Co.*, 6 W. Va. 425.

But any holding out by the company that would naturally and reasonably lead the assured to defer his action will estop and preclude the company from setting up any defense that it may have inveigled the assured into losing by reason of such inducements: *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11; *Bish v. Hawkeye Ins. Co.*, 69 Iowa, 184; *Miller v. Ins. Co.*, 70 Iowa, 704; *Eggleston v. Ins. Co.*, 65 Iowa, 308; *Moore v. Ins. Co.*, 64 N. H. 140; *Ames v. Ins. Co.*, 14 N. Y. 253; *Ripley v. Ins. Co.*, 30 N. Y. 136; *Thompson v. Ins. Co.*, 136 U. S. 287.

This principle is unquestionably right. The law requires

good faith and fair dealing on the part of both the assured and the insurer as well. It would be contrary to equity and good conscience, as well as manifestly unjust, to permit the insurance company to profit by its own unfair acts and conduct, which have resulted in the injury of its adversary whom it has thus made its confiding victim.

In a case where the company was notified of a loss, and it replied that the matter was in the hands of its state agent, and advised the assured to be patient, it was held that this was no waiver of the condition requiring proofs of loss to be furnished within a certain time. And though such letter be written before the proofs are furnished, yet the cause of action on the policy will not accrue until this condition be complied with: *German Ins. Co. v. Davis* (Neb.), 59 N. W. R. 698.

Again, where a loss occurred, and assured was advised by the company that an adjuster would be on hand at a certain time, and for assured to get his appraiser ready. This was held not to obviate the necessity of proofs of loss: *Harrison v. Ins. Co.*, 59 Fed. Rep. 732. Likewise, a letter acknowledging receipt of a notice of loss, and stating that the claim of the assured would receive prompt attention, does not waive the requirement that proofs of loss be first furnished before commencing suit: *Kirkman v. Ins. Co.* (Iowa), 57 N. W. R. 952.

Where the contract of the parties requires that a certain condition precedent shall be performed, if it is attempted to be complied with by the assured and he fail, the failure of the company to require more is but silence, and silence is not a waiver of the condition: *Keenan v. Ins. Co.*, 12 Iowa, 126.

So, where the assured furnished the proofs of loss after the time stipulated and the company thereupon denied any liability because the proofs were not furnished in time. The assured thereupon sent additional proofs, but the company remained silent thereafter. It was held that this was not a waiver of the condition requiring proofs to be furnished: *Peninsular L. & T. Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 666.

And where the insurance company received proofs of loss and claimed that the policy was void, it was held that the company was not precluded from setting up the limitation

clause in the policy in bar: *Lorr v. Ins. Co.*, 76 Iowa, 548.

By the mere fact that an adjuster of the company visited the place of the fire and offered to compromise the claim of assured upon a certain basis, which offer was refused by the assured, it was held that the clause requiring proofs of loss was not waived: *Maddox v. Ins. Co.*, 39 Mo. App. 198.

Nor does the failure of the company to demand proofs of loss and furnish blanks therefor waive the requirement that proofs be furnished before the cause of action accrues: *Continental Ins. Co. v. Dorman*, 125 Ind. 169.

Where the adjuster of the company visits the place of fire and makes an offer of settlement which is rejected by assured, and thereupon the adjuster tells assured that he will have to proceed under his policy, this is not a waiver of the conditions in a policy required to be performed before suit brought: *Kundson v. Hickla Ins. Co.*, 75 Wis. 198.

The failure of an insurance company to object to the proofs of loss furnished, while waiving the necessity of further proofs, does not waive the sixty days allowed by the policy within which to pay the insurance after the proofs are received. The failure to object to the proofs is nothing more than the receiving proofs properly made out, and the privilege of delaying payment for sixty days after receipt of proofs is retained in any event. So, in cases of this kind, the cause of action will not accrue until the expiration of the sixty days: *German-American Ins. Co. v. Hocking*, 115 Pa. 198.

In the case of *Steel v. Ins. Co.*, Judge Deady held, that where the insurance company had held out inducements and allured the assured into not suing the company for a time, but that the inducements were withdrawn and seven months of the limitation period was still left within which to sue, that this time was sufficient and reasonable, and that assured was barred for not bringing the action within that time. This doctrine is controverted in a late case determined in the Supreme Court of Illinois, affirming the ruling of the appellate court of that state: *Illinois Live Stock Ins. Co. v. Baker*, 38 N. E. R. 627. It is there held that where the company has once waived the limitation period, it cannot be revived, and that the claim

can then be considered by the assured as governed by the general statute of limitations. The question is not without some difficulty, but it would seem on principle that if the company should notify the assured that it would insist on every defence provided by the policy, though it had previously estopped itself from claiming the limitation stipulation, it would be reasonable to hold the assured to the period provided by the policy from and after such notice. The parties *in limine* contracted with reference to this stipulation. By allowing the assured the full period after he is notified that his claim will be resisted because not brought in the twelve months, we will say, he is then in *status quo*. He is just where he was before the clause was waived. He is not injured by reason of the inducements not to sue, if he has notice that he must proceed under his policy and is allowed the full time that would have been allowed had he not been misled. And though the insurer may have acted in bad faith or fraudulently with assured, and thereby have induced him to postpone his action too long, yet when he is put on notice that he will have to sue, he is not injured if he have as long thereafter in which to sue as he would have had if he had not been misled. As a general rule, fraud will not entitle any one to relief which he could not have had before the fraud if he has not been injured by the fraud or bad faith. And in all cases, as a general rule, where a waiver or estoppel is relied on by the assured to toll the limitation period, the *onus* is on the party alleging the waiver, not only to show it, but to establish that the person waiving the provision had the authority to do so: *German Ins. Co. v. Davis*, 59 N.W. R. 698.

It is generally held that a clause in a policy requiring any differences that may arise to be submitted to arbitrators is valid. And when such submission to arbitrators is made a condition precedent by the terms of the policy, it must be complied with before an action can be brought: *Mutual Fire Insurance Co. v. Alvord*, 61 Fed. Rep. 752. These stipulations in the policy, if they do not have the effect of ousting the courts of their jurisdiction, but simply provide for ascertaining the amount of the loss, are held valid and binding. The

courts can, nevertheless, be resorted to to enforce the payment of the loss found by the arbitrators. In such instances, suit can only be brought after the award, and for the amount found by the arbitrators. See *Hamilton v. Ins. Co.*, 136 U. S. 242; *Liverpool L. & G. Ins. Co. v. Wolff*, 50 N. J. L. 453; *Hall v. Ins. Co.*, 57 Conn. 105; *Hanover Ins. Co. v. Lewis*, 28 Fla. 209; *Ganche et al. v. Ins. Co.*, 10 Fed. K. 347; *Adams v. Ins. Co.*, 70 Cal. 198; *Old Sancelito L. & D. Co. v. Ins. Co.*, 65 Cal. 368. But where the policy does not stipulate that the making of the award is a condition precedent to the bringing of the action, it may be commenced, so far as the arbitration clause is concerned, at any time: *Mutual Fire Ins. Co. v. Alford*, 61 Fed. Rep. 752; *Crossley v. Ins. Co.*, 27 Fed. Rep. 30; *Hamilton v. Ins. Co.*, 137 U. S. 370; *Seward v. Rochester*, 109 N. Y. 164; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329; *Smith v. Assn.*, 51 Fed. Rep. 520.

The limitation clause in policies of insurance is usually inserted for the benefit of the insurer, though it results in an advantage to the honest policy holder. These limitation clauses are founded upon the general experience of mankind. In a sense they are based upon the observed result of events. They hasten diligence on the part of the insurer, and require him to present his claim for indemnity while the circumstances of the loss entitling him thereto are vivid in his mind, and can be intelligently and fairly presented and contended for. They protect the insurer, too, by placing a limit on the time within which the action may be brought, and prevent suit at a late day when time may have to a large extent, and perhaps totally, destroyed evidence that might defeat a dishonest recovery. The law presumes that one having a good cause of action will not needlessly delay from time to time until it may be difficult for him to establish his claim with reasonable certainty on the one hand, and equally as difficult for the company to resist a claim that may not be just, on the other. "It is not an unreasonable term that, in case of a controversy upon a loss, resort shall be had by the assured to the proper tribunal, whilst the transaction is recent and the proofs respecting it are accessible:" *Riddlesberger v. Ins. Co.*, 7 Wall. 386.

Nashville, Ark.

W. C. ROBERTS.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E.H. Hoag, 126 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

A TREATISE ON GENERAL PRACTICE, containing Rules and Suggestions for the Work of the Advocate in the Preparation for Trial, etc. By BYRON K. ELLIOTT and WILLIAM F. ELLIOTT. Two Volumes. Indianapolis and Kansas City: The Bowen-Merrell Co. 1894.

THE LAW OF VOLUNTARY SOCIETIES, MUTUAL BENEFIT INSURANCE AND ACCIDENT INSURANCE. By WILLIAM C. NISLACK. Second Edition. Chicago: Callaghan & Co. 1894.

THE FEDERAL INCOME TAX EXPLAINED. By JOHN M. GOULD and GEORGE F. TUCKER. Boston: Little, Brown & Co. 1894.

INCOME TAX LAW OF 1894. Paragraphed, Explained and Digested. By JOHN A. GLENN. Philadelphia: T. & J. W. Johnson & Co. 1895.

THE LAW OF MUNICIPAL CORPORATIONS, with Forms and Notes of the Decisions of the Supreme and other Courts of Ohio relating thereto. Fourth Edition. By HIRAM D. PECK. Cincinnati: The Robert Clarke Co. 1894.

SOCIAL GROWTH AND STABILITY. A Consideration of the Factors of Modern Society, and their Relation to the Character of the Coming State. By D. OSTRANDER. Chicago: S. C. Griggs & Co. 1895.

SELECTED CASES, ETC.

CASES ON CONSTITUTIONAL LAW, with Notes. Part III. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever. 1894.

THE AMERICAN DIGEST. (Annual, 1894.) Being Volume VIII of the United States Digest, Third Series Annual. Also, the Complete Digest for 1894. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul: West Publishing Co. 1894.

CASES FOR ANALYSIS. Materials for Practice in Reading and Stating Reported Cases, Composing Head Notes and Briefs, Criticizing and Comparing Authorities and Compiling Digests. By EUGENE WAMBAUGH, LL.D. Boston: Little, Brown & Co. 1894.

THE STUDY OF CASES. A Course of Instruction in Reading and Stating Reported Cases, etc. By EUGENE WAMBAUGH, LL.D. Second Edition. Boston: Little, Brown & Co. 1894.

BOOK REVIEWS.

A TREATISE ON THE LAW OF RES JUDICATA. Including the Doctrines of Jurisdiction, Bar by Suit, and Lis Pendens. By HUKM CHAND, M.A. London: William Clowes & Sons. Edinburgh: William Green & Sons. 1894. Printed at the Education Society's Steam Press, Ryculla, Bombay.

Judge Dillon has given us but recently a vivid pen-picture of the marvellous growth of our law. How it has followed the flag of England wherever it has been planted throughout the globe. How, in Westminster Hall, or where, beneath the dome of the Capitol at Washington, sits the most august of earthly tribunals, in local courts on the Atlantic seaboard or at the base of the Rocky Mountains;

"By the long wash of Australasian seas
Far off,"

or on the shores of the Pacific Ocean, or beneath Indian skies, the eyes of all—judge, lawyer and student—are couched to the same gladsome light of jurisprudence. This formidable work of 800 pages, which lies before us for review, is a tribute and further recognition of this grand triumphal march which has circled the world and tells us anew how in these great Anglo-Saxon Empires, over which float the Cross of St. George and the Stars and Stripes, there is a still greater force than the British Oak at work to protect against trespass *vi et armis*. In a thousand courts the scales of justice are held with even hand. Thousands of jurists and judges are applying the same principles, drinking from the same fountains, solving the same problems, working out the evolution of law and equity along the same lines, with the same underlying aim and thought in view, and obedient to the same jurisprudence. Recognizing this common ancestry and common foundation of our common law, this learned

Indian jurist expresses in his preface the conviction "That courts, and, to some extent, even the Legislature of one country, do not derive that assistance from the deliberations and declarations of eminent jurists and judges in other countries to which their high judicial value entitles them; and lawyers in every country often devote their time and energies to the discussion and determination of questions that have been already most fully debated and elucidated in others. Enactments are thus sometimes made and cases frequently disposed of in one country, in accordance with principles which are there regarded as indisputable, but which are not only in direct conflict with those recognized and acted upon elsewhere, but have themselves, in some instances, after a long trial, been found inconsistent with the proper administration of justice, and deliberately abrogated or tacitly relinquished as unsound."

It has been thought proper to quote freely from these two great writers who seem to clasp hands across the seas, because they indicate and vindicate the broad spirit of philosophy with which our friend, writing "under Indian skies," has approached a branch of the law which is to-day of equal import at the base of the Rocky and Himalaya Mountains. I find it in my heart to wish that the LAW REGISTER would give the space necessary for a reprint of the entire preface, so much does it commend itself as a convincing monograph illustrating "the great advantage accruing to the municipal law of every country, both in regard to its development and practical application, by a familiar acquaintance on the part of those concerned in its administration with the corresponding principles recognized and acted upon in other countries, an advantage not restricted to any particular branch of law, and extending even to the codified branches of it." Such a spirit, coupled with an infinite capacity of research, reinforced by a truly judicial ability to co-ordinate, marshal and weigh painfully acquired *knowledge*, so that the resulting evolution may be entitled to be christened *wisdom*, may be fairly attributed as the endowment which our learned author has brought to the consideration of the doctrine of *res judicata* in its applica-

tion to civil proceedings, and which, as he says, he has selected "to form the subject of his work on account of its practical importance and unusual difficulty."

Starting from a maxim couched in half a dozen words, he considers the elaborate rules "developed out of the multiplicity of controversies coming before the courts with a thousand minute shades of difference." The decisions of England, India and America are all laid under tribute to elucidate the principles laid down, and the French and Roman jurists have not been overlooked in tracing these principles to their source.

A fairly full index contributes to the utility of the book as a work of reference. The style is clear, concise and attractive, so far as it belongs to the author, although the enunciation of principles often has been left to the *ipsissima verba* of the judges or lawyers from whom he cites constantly and copiously. While the book is not likely to be thumbed over by the every-day case-law practitioner, it is one that commends itself to the lawyer who believes that law should be studied as science as well as practised as an art. It is certainly a most valuable contribution to legal literature.

EDWARD P. ALLIKSON.

PRACTICE IN ATTACHMENT OF PROPERTY FOR THE STATE OF NEW YORK. By GEORGE W. BREEDNER. Albany, N. Y.: Matthew Bender, Publisher. 1895.

It is somewhat surprising to find that proceedings in attachment under the New York Civil Code are attended with so many pitfalls for the unwary as to call for a separate treatise upon the rules and practice governing such measures. An examination, however, of the code and of the decisions in the voluminous practice reports, justifies the author's contention that a book upon this subject, covering the latest amendments to the code and reported cases, is a necessity. So far as can be judged, the work has been thoroughly and conscientiously done. There are about six hundred citations, most of them from the New York Reports of the last ten years. The

arrangement is simple and consistent. There is also an appendix containing eighty-eight forms. The book should be of service to that busy class of commercial lawyers who are invariably called upon to decide the most difficult points of practice at a moment's notice.

W. H. L.

SYNOPSIS OF THE LAW OF CRIMES AND PUNISHMENTS. By JOHN B. MINOR, LL.D., Professor of Common and Statute Law in the University of Virginia. Richmond: Printed for the Author. 1894.

The object of this book, as stated in the preface, is to prepare the student "to *enter upon* the practice of the law in the criminal courts." Perhaps this is rather a large claim to be made for any single volume, particularly one of only three hundred odd pages.

But if, as he is advised to do, the student uses it only in connection with a careful reading of the standard text-writers and of the leading cases; if, in short, he regards it simply as an outline to be filled in, he will doubtless find it a very useful adjunct to his studies—a guiding thread through the labyrinths of the more voluminous treatises.

The seven chapters treat, respectively, of: the general nature of crimes and punishments; persons capable of committing crimes and amenable to punishment; the several degrees of guilt; the several crimes, with their respective punishments; certain general principles touching crimes and punishments; the means of preventing offences; and the method of punishing offences.

The idea of a synopsis is followed throughout; and, though the system of divisions and sub-divisions is a trifle confusing, the book is, upon the whole, to be commended, not only for clearness and condensation, but for careful and scientific arrangement. The time-honored and indispensable definitions are set forth, with frequent citations to the fountain-heads of the law; but the illustrative cases are fewer than might be

desired, and are found, almost without exception, in British or Virginian Reports.

And although, as a practical working tool for students in that State, its utility is thereby enhanced, the general interest of the book is limited by the fact that, from first to last, it deals primarily, and often exclusively, with Virginia law.

S. D. M.

AMERICAN PROBATE LAW AND PRACTICE. A Complete and Practical Treatise, Expository of Probate Law as it Stands To-day, Including a Discussion of the General Principles Governing the Execution and Proof of Wills, &c. Applicable to all the States. By FRANK S. RICE, Counsellor-at-Law, Albany, N. Y. Albany, N. Y.: Matthew Bender, Law Publisher, 511-513 Broadway. 1894.

This is the first attempt to unite in one homogeneous work the principles that underlie the varying practice in matters of probate in the several states of the Union, and while necessarily subject to all the drawbacks which attend a pioneer excursion into an unknown region, without the marks of former explorers as a guide, the author has been very fortunate in his accomplishment of the task he has set himself. The arrangement of the work, and the development of the subject, while not precisely scientific, are probably as nearly so as one has a right to expect from the subject-matter.

The author's statements of the law are sometimes too vague, rather than stated in the clear, unmistakable manner that becomes the author of a text-book. When the cases on a subject are conflicting, it is the duty of the writer to state what the courts should have decided. What they did decide can be learned from the digests of cases; and without a definite opinion to which to pin our faith, we are left to flounder hopelessly. And even when the decisions are plain enough, the same fault appears. In speaking of the status of an adopted child in regard to extra-territorial inheritance (p. 553), a mere reference is made to the case of *Ross v. Ross*, 129 Mass. 243,

instead of a *résumé* of the principles laid down therein; and, in passing, we may remark the absence of any reference to a recent Illinois case, *Keegan v. Geraghty*, 101 Ill. 26, which is fully as important as *Ross v. Ross*.

Some mistakes are so patent that they would seem to be due to careless typography and proof-reading, as, for instance, when the author is made to say, on p. 109, in substance, that a holographic will is synonymous with holographic.

But in most matters the author's judgment is singularly sound. He repudiates the rule of the Massachusetts courts, that a stock dividend represents capital in all cases, and follows the opinion of Judge Redfield, which makes the decision of the question whether such a dividend is capital or income depend on the circumstances of the case, and whether it represents earnings or increased capital, without regard to the form in which it is declared.

It was, of course, impossible to refer, in a work like the present, to even every important case on the subject under discussion. But while, of course, no exception can justly be taken to the fact that the author's estimate of what are the most important cases should differ from ours, one cannot help feeling slightly aggrieved that some seemingly noteworthy cases have been omitted without the least reference. Such, for instance, on the subject of undue influence by means of spiritualism, is *Middleditch v. Williams*, 45 N. J. Eq. 726, which is the most important recent case on that question.

Among other minor omissions, may be noted the fact that there is no reference to the cases in which the word "relatives" or "relations" has been construed to include or exclude certain classes of persons—*e. g.*, illegitimates—as *In re Jordell*, 44 Ch. D. 590.

But, in spite of these imperfections, which, as was said before, are almost essential in a pioneer work, Mr. Rice has conferred a substantial benefit upon the profession by this volume, which we are sure it will not be slow to recognize.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

FEBRUARY, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR JANUARY.

Edited by ARDENUS STEWART.

The bidder for municipal contracts has a hard time of it, unless, as sometimes happens, he owns the town. He has even fallen under the animadversion of the Supreme ^{Bids.} ~~Mandamus~~ Court of the United States, which has held, in a recent case, that as mandamus lies to an officer to do only such ministerial duty as existed when the application for mandamus was made, it will not lie to compel him to sign a contract in accordance with an advertisement for public work, and a bid therefor, when, before the application, the work was readvertised, and the same person made a lower bid, under which he obtained a contract for the work: *United States v. Lamont*, 15 Sup. Ct. Rep. 97. See 1 AM. L. REG. & REV. (N. S.) 899; *Ibid.*, 742, 819, 820, 851; 2 AM. L. REG. & REV. (N. S.) 5.

The Supreme Court of North Carolina has ruled, that

punitive damages will not be awarded against a railway company, because, by reason of defective equipments, it failed to carry a person to whom it had sold an excursion ticket, back to his starting point, when the only injuries complained of are such as result from inconvenience, delay, and disappointment, and there is no evidence of bad motives on the part of defendant: *Hansley v. Jamesville & W. R. Co.*, 20 S. E. Rep. 528; disapproving *Purcell v. R. R.*, 108 N. C. 414; S. C., 12 S. E. Rep. 954. Clark, J., dissented.

According to a recent decision of the Supreme Court of Appeals of West Virginia, when the proper official of a railroad company fails to inform a conductor of a change in its rules and regulations as to the sale of tickets and the stoppage of its trains, and the conductor, acting through want of the necessary information, wrongfully refuses to carry a passenger to his destination, and ejects him from the train, the company is liable to the passenger, in an action on the case, for the damages sustained by reason of the wrong committed: *Sherts v. Ohio River R. R. Co.*, 20 S. E. Rep. 566.

The statutory right to recover damages for death occasioned by the negligence of another, has lately been made the subject of a very curious ruling by the Supreme Court of Vermont, to the effect that a statute of Massachusetts, making railroad companies liable for death by their wrongful act, in an action by the executor of the deceased, in damages not "less" than a certain amount, to be assessed with reference to the culpability of the company, and providing that in case the deceased leaves no widow or child the damages shall go to his next of kin, is a penal statute, and that therefore an action cannot be brought under that statute in another state: *Adams v. Fitchburg R. R. Co.*, 30 Atl. Rep. 687.

The question whether a statute giving compensation to the relatives of the deceased is to be regarded as penal or compensatory, of course depends upon its wording; but the

Carrier,
Breach of
Contract,
Damages

Ejection of
Passenger

Conflict of
Laws,
Death by
Wrongful Act

general tendency is to regard it as compensatory, unless clearly otherwise. If penal, no action lies thereon in another state; but if compensatory merely, suit can be maintained thereon in any state where the deceased was domiciled, if the law of that state is not inconsistent with that of the state under which the action is brought: *Nelson v. Chesapeake & Ohio R. R.*, 88 Va. 971; *Wintusko's Admr. v. Louisville & N. R. Co.*, (Ky.), 20 S. W. Rep. 819. The statutes need not be precisely alike; it is sufficient if they are similar in policy, are founded on the same principle, and give substantially the same right of action to redress similar wrongs. It makes no difference that the mode of distribution of the damages recovered is not the same, if the provisions of the statute under which the suit is brought can be carried out by the existing legal machinery of the courts of the forum; nor does it alter the case that the limit of recovery is fixed in the one case by statute, but left in the other to the discretion of the jury: *Hanna v. Grand Trunk Railway Co.*, 41 Ill. App. 116. (In this case the action was brought under the laws of Canada.) But suit cannot be brought in a federal court in the state of the domicile, by any one not authorized to sue by the laws of the state of the injury, though such person is authorized to sue by the laws of the former state: *Wilson v. Tootle*, 55 Fed. Rep. 211. When the laws of the two states are radically different, such a suit cannot be maintained: *St. L., Iron Mountain & So. Ry. Co. v. McCormick*, 71 Tex. 660; S. C., 9 S. W. Rep. 540; *Belt v. Gulf, C. & S. F. Ry. Co.*, (Tex.), 22 S. W. Rep. 1062; and when the laws of the state of injury, (in this case Mexico,) give no right of action, no suit can be maintained in another state: *De Ham v. Mexican Nat. R. R. Co.*, (Tex.), 22 S. W. Rep. 249. There is an instructive article on this subject, by Gilbert E. Porter, in 35 Cent. L. J. 185.

The Supreme Court of Oregon, in *Longshore Printing & Pub. Co. v. Howell*, 38 Pac. Rep. 547, while asserting that ~~conspiracy~~ when persons conspire to injure or destroy ~~information~~ another's business or property, and it clearly appears that the injury is threatened and imminent, and will

be irreparable, an injunction will lie to restrain the conspirators, refused to grant an injunction on allegations made by the plaintiff that the members of the defendant trades union conspired to compel him to submit to the union's dictation, upon pain of being boycotted in business; that the executive committee of the union entered the plaintiff's premises without license, and ordered his employes to strike, and that subsequently the union ordered another strike, both of which orders were obeyed; that the defendant induced the city council, by threats of boycott at the polls, to reject plaintiff's bid for the city printing, although that bid was the lowest made; that defendant threatened to boycott plaintiff's customers if they patronized him, on account of which he lost one customer, and will lose another; and that defendant circulated the fact of the strikes by posting notices thereof in numerous places, all to the past injury and future danger of plaintiff's business; on the ground that these allegations were not sufficiently definite to justify the issuance of an injunction. This is mere pandering to the labor unions.

The Supreme Court of the United States has ruled, in *State of South Carolina v. Wesley*, 15 Sup. Ct. Rep. 230, that when a suit is brought against persons for property which they claim to hold as custodians of the state, and the state does not intervene, but expressly refuses to submit its rights to the jurisdiction of the court, it cannot ask the supreme court to review the refusal of the trial court to dismiss the complaint against the defendants, on the suggestion of the state that the action was really against the state, brought without its consent, and that the court had no jurisdiction.

The Circuit Court for the Northern District of Illinois, in *U. S. v. Debs*, 64 Fed. Rep. 724, has decided, that when persons have entered into a conspiracy to boycott certain cars, and for that purpose engaged in a conspiracy to restrain and hinder interstate commerce in general, and in furtherance of that design, those actively engaged used threats, violence, and other unlawful means of

**Constitutional
Law.
Suits Against
State**

Contempt

interference with the operations of the roads, and, instead of respecting an injunction commanding them to desist, persisted in their purpose without essential change of conduct, they were guilty of contempt; and that any improper interference with the management of a railroad in the hands of receivers is a contempt of the court's authority in making the order appointing the receivers, and enjoining interference with their control of the road.

This is the decision against which Mr. William Draper Lewis inveighed so strongly in the December number of this magazine, 1 AM. L. REG. & REV., (N. S. 879,) and it may not be amiss to point out here the fallacy of that writer's argument. The question of the criminality of the acts of the strikers had nothing to do with the question of the injunction. That question was simply whether or not the strikers, *as a body*, should be permitted to interfere with the property of the railroads, so as to prevent the carrying on of interstate commerce, *with which only the federal courts were concerned*. Those courts had nothing whatever to do, in the shape in which the question was brought before them, with the individual criminal acts of the strikers, whether regarded as offences against the state laws, or against those of the United States. The matter was brought before them solely on the interstate commerce clause of the Constitution, and the act of Congress passed in furtherance of it, prohibiting all combinations in restraint of interstate commerce. But this act is only a re-enactment, *pro tanto*, of the common law, which prohibits all contracts in restraint of trade; and a conspiracy is none the less a contract between the conspirators, because it is not a commercial transaction. Now, the question of what is a restraint of trade is one peculiarly for the court, not for the jury; and it follows, therefore, that it in no sense deprives the conspirator of a trial by jury, to forbid him to do the acts which violate the statute, and to punish him if he disobeys the prohibition. He is punished, not for the act done, but for the disobedience. This view of the case completely does away with the objection that such process is a deprivation of the right of trial by jury.

Again, it is urged that an injunction must rest upon a claim of right. This may be more readily conceded, because in this case the claim of right existed; for it is not essential that the claim be a valid one. Preposterous as it may seem, the laboring classes are at present claiming an interest in the property of their employer, and even, as in the Homestead strike, a right to take the management of that property wholly out of his hands, and to control it themselves. The very ground claimed as an essential of the injunction process is therefore present; and the employe can be enjoined from so treating the property of his employer. The fact that he damages the property in asserting this claim is a mere incident, and whatever its effect as to the criminal liability of the employe, cannot affect the other question.

According to a recent decision of the Supreme Court of North Carolina, an agreement for compensation for procuring the appointment or resignation of a public officer, ^{Contract.} ^{Public Policy} is void, as against public policy; and therefore a mortgage, given to secure the payment of compensation for procuring the appointment or resignation of such an officer, is also void, for the same reason: *Basket v. Moss*, 30 S. E. Rep. 733.

The Supreme Court of California, has lately held, that, under their statute, a stockholder may choose any person to ^{Corporations.} cast his vote, and a by-law providing that no ^{Proxies} proxy shall be voted by any one not a stockholder, is unreasonable and invalid: *People's Home Savings Bank v. Superior Court of City and County of San Francisco*, 38 Pac. Rep. 452.

According to the Supreme Court of Missouri, a freight solicitor in charge of a railway business office is "an officer or ^{Service.} ^{Agent} agent of such corporation," within the meaning of a statute providing for service on the corporation by delivering a copy of the summons and complaint to such officer or agent: *Davis v. Jacksonville South-Eastern Line*, 28 S. W. Rep. 965. See 2 AM. L. REG. & REV. (N. S.) 10.

In the opinion of the Court of Appeals of Maryland, letters of administration granted to the second son of a decedent, upon the representation that he is the only son, should be revoked for fraud, although the oldest son may since have filed a renunciation of his right to the appointment: *Lutz v. Mahan*, 30 Atl. Rep. 645.

It is strange, that some people never seem to consider a point of law as finally settled, no matter how overwhelming the weight of authority may be. The Supreme Court of North Carolina has lately been called upon to decide, that a person who leases rooms in a building for the purpose of taking photographs, is not entitled to damages from an adjoining landowner, because the latter builds so as to shut off the lessee's light on the side of the leased premises, as there is no easement of light by prescription in the United States: *Lindsey v. First Nat. Bk. of Asheville*, 20 S. E. Rep. 620. There is no easement by prescription in light and air: *Knabe v. Lovelle*, 23 N. Y. Suppl. 818; *Leroy v. Samuel*, 23 N. Y. Suppl. 825; S. C., 4 Misc. Rep. 48; *Western Granite & Marble Co. v. Knickerbocker*, (Cal.), 37 Pac. Rep. 192; nor will such an easement be implied, as to land of the lessor, by the lease of a building to be used for a purpose requiring light, such as marble cutting: *Keating v. Springer*, 146 Ill. 481; S. C., 34 N. E. Rep. 805.

The Supreme Court of California, in *Lay v. Parsons*, 38 Pac. Rep. 447, has ruled, that the provision of the Ballot Law, requiring a voter to place a cross, marked by a stamp, opposite the name of each candidate for whom he votes, is mandatory. The same view was taken in *Sege v. Stoddard*, (Ind.), 36 N. E. Rep. 204. See 1 AM. L. REG. & REV. (N. S.) 748.

The Supreme Court of Michigan has recently held, (1) That in a convention for the nomination of candidates for public offices, the question whether certain delegates are entitled to vote may be properly submitted to a committee on credentials; and, (2) That in case of a

tie vote at such a convention, neither the election officers nor the candidates can determine the result by lot, in the absence of a statutory provision authorizing such action: *Beck v. Board of Election Commissioners*, 61 N. W. Rep. 346.

The Supreme Court of Idaho, in *Perry v. State*, 38 Pac. Rep. 655, holds, Huston, C. J., dissenting, that though confidential communications between attorney and client are privileged, and neither can be compelled to reveal them, yet if they are overheard by a third party, either by accident or design, that third person can be compelled to testify to them.

Evidence.
Confidential
Communications.

According to the opinion of the Supreme Court of North Carolina, in *State v. Caldwell*, 20 S. E. Rep. 523, when the deceased, before making his declaration to his physician, tells him that he knows he is going to die, the fact that the physician tells him that he too thinks he is going to die, but hopes he will get well, and that another person has just told him that the physician had hopes for him, will not render the declarations inadmissible. See 1 AM. L. REG. & REV. (N. S.) 813; 2 AM. L. REG. & REV. (N. S.) 15.

Dying
Declarations

The question of the validity of gifts *causa mortis* comes very frequently before the courts. Among others, the Supreme Court of Rhode Island has recently decided, that evidence that, the day before deceased died, after her daughter had handed her certain books, as requested, among which was a bank book, she returned them to the daughter, saying, "Take the books, and keep them; they are yours forever;" coupled with the evidence of another witness that deceased told her shortly thereafter that she had given that daughter all her property, because she had nursed her during her sickness, will not establish a *donatio causa mortis*, in the face of evidence that deceased had always intended to make a larger provision for another daughter, and several years before her death had made a will, in which the first daughter was appointed executrix, and which would be almost wholly defeated if the gift was allowed to stand; that the

Gifts
Causa Mortis

second daughter had been to see the deceased during her illness, and had offered to nurse her, which proposition was declined by the first daughter, who lived in the same house as her mother; and that deceased was suddenly taken worse, and died before the second daughter knew that she was seriously ill: *Citizens' Sav. Bk. v. Mitchell*, 30 Atl. Rep. 626.

The evidence to establish a *donatio causa mortis* must be clear and convincing, and inconsistent with any retention of control or possession by the donor; and therefore, when the donee of a bank book has included the balance in bank in his inventory of the decedent's estate, and has otherwise treated it as a part of that estate, it will be held to be such, and not a gift: *Wiggl's Estate*, 76 Hun, 462; S. C., 31 Abb. N. C. 159; 28 N. Y. Suppl. 95. But a gift of money on deposit in a bank, effectuated by delivery of the bank book by the donor to the donee, and its acceptance by the latter, is not invalidated by the fact that it is accompanied with a direction to the donee to divide the balance of the money, after the payment of the donor's doctor's bill and funeral expenses, between himself and others named by the donor: *Loucks v. Johnson*, 70 Hun, 565; S. C., 24 N. Y. Suppl. 267. But, though a *donatio causa mortis* may be made in trust for a third person, the mere handing of a certificate of deposit to another for safe keeping, with a request to see that the decedent's children get the money in case he dies, is not valid as such: *Dunn v. German-American Bk.*, 109 Mo. 90. There is also a marked difference between the gift of a savings bank book and one of a national bank. The validity of the former as a *donatio causa mortis* depends on the effect of such delivery, according to the rules of the bank; the delivery of the latter, not affecting the right of the donor to withdraw the deposit by check, is, as a rule, ineffectual: *Thomas v. Lewis*, 89 Va. 1; *Jones v. Weakley*, (Ala.), 12 So. Rep. 420. There is a valuable article on this subject, by James M. Kerr, in 36 Cent. L. J. 354; and a very full annotation, in 31 AM. L. REG. 681.

The maxim, *de minimis non curat lex*, applies only when

both the thing itself, and its effects, are of infinitesimal importance. What is apparently more insignificant than a pin? And yet a pin may become of supreme importance, and, as shown by the Supreme Court of North Carolina, which has been fortunate enough to have the opportunity to decide this totally new point in criminal law, not only one, but even two lives, may depend upon it. In the opinion of that court, the pushing of a pin down an infant's throat, thereby producing its death, is killing it by means of a deadly weapon, and if the intention to so take the child's life is deliberately formed, and carried into execution, it is murder in the first degree: *State v. Norwood*, 20 S. E. Rep. 712.

The Supreme Court of California, in *Pro. v. Worthington*, 38 Pac. Rep. 689, has very wisely ruled, that evidence showing that the defendant was told by her husband to kill the deceased, and that she did so, does not tend to prove that the defendant was hypnotized, and so render admissible evidence of the effect of hypnotism on people subject to its influence.

The Supreme Court of Wisconsin has lately held, in *Lord v. American Mut. Acc. Assn.*, 61 N. W. Rep. 293, that it is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand, is a loss of the hand "causing immediate, continuous, and total disability," within the meaning of that clause in a policy of accident insurance. This contrasts very strongly with the indefensible decision of the Supreme Court of New York, that when the plaintiff's hand was cut off a short distance above the knuckles, leaving nearly the whole palm, and part of the second joint of the thumb, which the plaintiff testified was of considerable use to him, it was not a loss of "one entire hand," within the meaning of an accident policy: *Sackett v. Travellers' Ins. Co. of Hartford*, 30 N. Y. Suppl. 881. Bradley, J., dissented, as well he might.

The control of the federal government over interstate com-

Interstate
Commerce,
Insurance,
Marine,
License

merce is one of the most important questions of the day, and has of late been almost constantly before the courts. The Supreme Court of the United States, Justices Harlan, Brewer and Jackson, dissenting, has decided that the business of marine insurance, like other insurance business, is not commerce, or an instrumentality thereof, but merely an incident, and therefore the constitutional provision as to interstate commerce does not prevent a state from prescribing conditions on which a foreign insurance company may do business in the state, or from enforcing such conditions: *Hooper v. People of State of California*, 15 Sup. Ct. Rep. 207.

Restraint
of Trade

Mr. John G. Johnson, of the Philadelphia Bar, has at last secured a final victory in the Sugar Trust Case; but one that reflects little credit on the body that awarded it. The Supreme Court of the United States, in a long opinion by Mr. Chief Justice Fuller, affirming the decree of the Circuit Court of Appeals, reported in 60 Fed. Rep. 934, which in turn affirmed the decision of the Circuit Court, reported in 60 Fed. Rep. 306, has decided, that the agreement by which the American Sugar Refining Company incorporated with itself the Philadelphia Refineries, thus securing absolute control over ninety-eight per cent. of the total out-put of refined sugar in the United States, with the necessarily incident power to dictate the price of that commodity throughout the Union, is not within the prohibition of the act of Congress of July 2, 1890, (26 Stat. at Large, 209, c. 647), providing "that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several states, is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several states, shall be guilty of a misdemeanor." The opinion is a remarkable one. In brief, it amounts to just this, (after one has washed from his eyes the dust kicked up to blind them, and has taken time to sift the few grains of wheat from the pages of chaff,) that such a contract is not within the purview of the statute, because it refers

primarily to the *manufacture* of the article in question, and not to its interchange among the states, and is consequently not within the power of Congress to regulate interstate commerce. But this conclusion was only arrived at by studiously ignoring the facts, that the people of the United States, not merely those of Pennsylvania, have been forced to pay higher prices for sugar since the contract in question; and that the direct result of that contract was to affect interstate commerce, by precluding all competition in that particular trade. It also ignores the fact that the parties to the contract were citizens of different states, and therefore peculiarly within the jurisdiction of the federal government. Suppose one state had undertaken, under its own laws, to set aside such a contract. The parties would instantly have raised this very objection to the state jurisdiction, and this same court, which so strenuously insists that the annulling of such a contract is solely within the state power, would have been obliged to admit that claim, or overturn a series of judicial decisions reaching back almost to the beginning of our national history. It would be delightful to see the court impaled on the horns of that dilemma. But it is well-nigh useless to comment further on this decision, for Mr. Justice Harlan, who is so uniformly found on the right side of a question as to almost create the impression of infallibility, dissented from the rest of the court, in clear, forcible, intelligent language, which bears the strongest contrast to the inane hedging and futile searching for support, that characterize the main opinion. It is matter of regret that his opinion is too long to quote in full. Two paragraphs, however, are so clear in their presentation of the true bearings of the case, and the effect of the decision, that they must be given place:

"Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other states, cannot be imposed, even by a state, without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a *state* within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar *to be transported to other*

states, how comes it that combinations of corporations or individuals, within the same state, may not be prevented by the national government from putting unlawful restraints upon the purchasing of that article to be carried from the state in which such purchases are made? If the national power is incompetent to repress state action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one state to another state, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may, so far as national power and inter-state commerce are concerned, do, with impunity, what no state can do. . . .

"If this [that Congress has power to prohibit such combinations] be not a sound interpretation of the Constitution, it is easy to perceive that interstate traffic, so far as it involves the price to be paid for articles necessary to the comfort and well-being of the people in all the states, may pass under the absolute control of overshadowing combinations, having financial resources without limit, and an audacity in the accomplishment of their objects that recognizes none of the restraints of moral obligations controlling the action of individuals; combinations governed entirely by the law of greed and selfishness—so powerful that no single state is able to overthrow them and give the required protection to the whole country, and so all-pervading that they threaten the integrity of our institutions."

There is one other consideration that might have been urged, and that is this: No one questions to-day the fact that the Constitution of the United States, in common with all constitutions, is not a cast-iron frame, adapted only to the circumstances in which it was moulded, but is elastic, and capable of being adapted to new conditions as they arise. No one, also, will question the fact that the framers of the Constitution, had they foreseen the occurrence of a contingency like the present, would have prepared express means to meet it. Now, when such means exist by implication, and can be

adapted to the end with far less of violence than in the case of many an actual usurpation of power, what sound reason can be given for refusing to employ them? The Constitution never intended that Congressmen should be elected for their monetary qualifications; that they should purchase re-election by River and Harbor appropriations; that a convention of delegates of worse than doubtful antecedents should dictate to the people the choice of a President; or that an actual minority of the people of the country, by means of an accidental majority of Congressmen, the unjustifiable unseating of members of the opposite party to increase that majority, and the violation of every principle of parliamentary law, should enact laws to enrich the few at the expense of the many; and yet all these things have been done, and have been winked at, if not actually favored, by this same court. It is enough to say that if this decision stands, and if it is true that the national government is powerless to protect the people against such combinations as this, which the states are both unwilling to assail and powerless to overthrow, then this government is a failure, and the sooner the social and political revolution which many far-sighted men can see already darkening the horizon overtakes us, the better.

The court last mentioned holds, with far better reason, that the courts of a state from which a fugitive from justice is demanded by rendition proceedings, do not deny to such person any rights secured to him by the Constitution and Laws of the United States, by refusing to pass on the constitutionality of the statute of the demanding state under which the indictment against such person is sufficient: *Prace v. Texas*, 15 Sup. Ct. Rep. 116.

The Supreme Court of North Carolina, in *State v. Hall*, 20 S. E. Rep. 729, has laid down the absurdly technical rule that when a person is murdered in one state by persons in another, shooting across the border, the criminals, who has never been actually within the territory of the state of the injury since the commission of the crime, though it was constructively committed there, are not

persons who have fled from justice and been found in another state, within the meaning of the Constitution of the United States, Art. IV, § 2, cl. 2, providing that a person so doing shall be surrendered on demand of the state from which he has fled; but graciously acknowledges, that though the governor cannot surrender such a person without statutory authority, (*sed quare?*), the legislature may supply this *casus omissus*, and give him the power. Clark, J., dissented, in a very forcible opinion, declaring that in his estimation, "a person who places himself outside the limits of the state, from thence to commit the crime within the state, and ever afterwards avoids going into said state to avoid arrest, as truly 'flees from justice' as he who, having committed a crime, flees from the state subsequently. If an infernal machine sent by mail or express from a distant state explodes and kills the receiver, it is murder committed in the latter state. The sender skulking in another state to avoid arrest is as truly a fugitive from justice as if he had accompanied the machine to its destination, and then fled." In reference to the suggestion that the state legislature might pass a law providing for the surrender of the criminal in such a case, he makes the following keen criticism: "It is true the several states might pass statutes broader than the clause quoted from the federal constitution, but it is also true that some of them might fail to do so. The federal constitution does not contemplate leaving the security of so many cities and towns, lying near state boundaries, dependent upon the inadvertence or unwillingness of the legislature of a neighboring state to pass an extradition law more liberal than the federal constitution."

The view of the majority of the court rests upon a fancied analogy with the case of *State v. Mott*, 73 Ala. 503. There a person, who it was claimed had obtained goods by false pretences from the New York agent of the prosecutor, a resident of Pennsylvania, the false representations, if any, being made to the agent, and who had never been in Pennsylvania, was held not to be a fugitive. There is this noticeable difference between the cases, that in the latter case there had been no commission of the crime, constructive or otherwise, in Penn-

sylvania; which is sufficient reason for the correctness of that decision. This saving element is wanting in the North Carolina case. As to who is a fugitive, see 2 AM. L. REG. & REV. (N. S.) 18.

The liquor laws are another subject of continued dispute, and the decisions are sometimes hopelessly conflicting, both with each other and with common sense. The ^{Intoxicating} Supreme Court of Missouri, however, is usually ^{Liquors,} correct on such questions, and has again proved ^{Social Clubs} itself so by holding that an incorporated club is not a person, within the meaning of an act requiring the "person" licensed to satisfy the court that he is a law-abiding, assessed, tax-paying, male citizen, over twenty-one years of age; and that when a *bona fide* social club, with limited membership, admission to which cannot be obtained by persons at pleasure, and whose property is actually owned in common by its members, distributes liquors belonging to it among them, it is not an illegal sale, within the prohibition against sales by persons not licensed: *State v. St. Louis Club*, 28 S. W. Rep. 604.

This is the prevailing opinion: *Graff v. Evans*, 8 Q. B. D. 373; *Tennessee Club v. Dwyer*, 11 Lea, (Tenn.), 452; *Piedmont Club v. Comm.*, 87 Va. 540; S. C., 12 S. E. Rep. 963; *State v. McMaster*, 35 S. Car. 1; S. C., 14 S. E. Rep., 290; *Barden v. Montana Club*, (Mont.), 25 Pac. Rep. 1012; *Comm. v. Pomphret*, 137 Mass. 564; though some courts have thought otherwise, and have punished the steward of the club as an unlicensed seller of liquor: *Martin v. State*, 59 Ala. 34; or at least required the club to pay the license tax required of retailers: *Kentucky Club v. Louisville*, 92 Ky. 309; *Pro. v. Soule*, (Mich), 41 N. W. Rep. 908; *State v. Boston Club*, (La.), 12 So. Rep. 895; *Nogales Club v. State*, 69 Minn. 218. If, however, the club is a mere device to evade the provisions of the license law, the person who dispenses the liquor is, of course, liable for a violation of that law: *Comm. v. Ewig*, 145 Mass. 119; S. C., 13 N. E. Rep. 365; *Comm. v. Tierney*, 148 Pa. 552; and any sale by a club to its members, in violation of a prohibition or local option law, is illegal: *State v. Easton*

Social Club, 73 Md. 97; S. C., 20 Atl. Rep. 783; *State v. Lockyear*, 95 N. C. 633; *State v. Neis*, 108 N. C. 787. There is an excellent article on this question in 14 Crim. L. Mag. 541, and a long, well-considered annotation thereon, in 31 AM. L. REG. 861.

The Supreme Court of New Jersey has recently decided, in *Williams v. Mershon*, 30 Atl. Rep. 619, that when a lease is made of the wife's land, by the husband, for one year, with the privilege to the tenant of a further term of four years, without authority from her, the act of the wife in receiving the share of the farm products reserved by the lease for the first year will not operate by way of estoppel to create a term for five years. Her assent, under the statute of frauds, must be in writing.

The Supreme Court of Vermont, in *Mack v. Dailey*, 30 Atl. Rep. 686, has ruled, (1) That when a lease provides that if the lessee keeps all its conditions he may purchase the land, the acceptance by the landlord of the rent after it is due, without objection, waives a breach of the condition as to the time of its payment; and, (2) That a provision in the lease that the lessee may buy the land "at the option of the parties," means that the lessee may buy at his own option.

The Supreme Court of North Carolina has recently held, in accord with the weight of authority, (1) That one who forms the design to steal, and carries out that design, is guilty, though the owner is advised of the intended larceny, appoints agents to watch the thief, and allows him to commit the theft, with a view to having him punished; (2) That when the agent of the owner of the property tells a servant to persuade a third person to steal that property, and he does so, and the property is taken by such person, the latter is not guilty of larceny, though he had previously formed the intent to steal it; for (3) Larceny cannot be committed unless the stolen property be taken against the will of the owner; and therefore cannot be committed, when the owner, through his agent, consents to the

Landlord and
Tenant,
Part of Lease

Lease,
Option to
Purchase

Larceny.
Consent of
Owner

taking and asportation, though the consent is given for the purpose of apprehending the criminal: *State v. Adams*, 20 S. E. Rep. 722.

It is well settled, that there can be no larceny with the consent of the owner, even if that consent is given for the sole purpose of entrapping the person suspected, and the doer of the act does not know of the existence of the circumstances which prevent the criminal quality from attaching: *Connor v. Pro.*, 18 Colo. 373. The same is true in the case of extortion: *Pro. v. Gardner*, 73 Hun, 66.

According to a recent decision of the Supreme Court of Michigan, when, in an action for libel for publishing a newspaper article, stating that plaintiff was arrested for larceny, and giving the number of his residence, evidence is given that another person of the same name as plaintiff was arrested, it does not show, as matter of law, that defendant intended in good faith to refer to such other person: *Davis v. Marshansen*, 61 N. W. Rep. 504. See 2 AM. L. REV. & REV. (N. S.) 21.

In the opinion of the Supreme Court of South Carolina, a person who solicits orders, by sample, for sewing machines and their parts and attachments, for a foreign sewing machine company, which has a store and stock of goods in the state, from which such orders are filled, is not a "hawker or peddler," though he occasionally sells a sample machine out of his wagon: *State v. Morhead*, 20 S. E. Rep. 544.

The Supreme Court of Iowa holds, with good reason, that the fact that the defendant in an action for malicious prosecution consulted an attorney before prosecuting the plaintiff for opening his mail, is not admissible as proof of probable cause, when it also appears that the attorney gave defendant no advice, but referred him to the United States officers: *Holden v. Merritt*, 61 N. W. Rep. 390. There is an annotation on this subject in 1 AM. L. REV. & REV. (N. S.) 591.

The Supreme Court of Mississippi has recently decided, that when a note made in another state by a married woman is sued on in Mississippi, the liability of her separate estate therefor will be determined by the laws of the latter state; and will be held to charge her separate estate there, though it could not do so under the laws of the place of contract: *Read v. Brewer*, 16 So. Rep. 350.

The Court of Appeals of Maryland, in *City & Suburban Ry. Co. v. Moors*, 30 Atl. Rep. 643, has reasserted some of the familiar principles of the law concerning the liability of an employer for the act of an independent contractor; holding, that though a person who owes a duty to the public in the execution of any work, cannot relieve himself from liability for a breach of that duty by committing the work to an independent contractor, yet neither (1) A railway company, which permits an engine to be run on its tracks by a contractor in performing his contract with third parties, nor (2) A turnpike company, which lawfully permits an independent contractor to operate an engine over railway tracks laid on the pike, in performing his contract with the company, is liable for an injury caused by the negligent operation of the engine.

As a general rule, the employer will not be liable for the negligence of an independent contractor, if he has selected one who is competent, and the work to be done is safe, when ordinary care is used: *Eagle v. Enrich Club*, (N. Y.), 32 N. E. Rep. 1052. (1) But the contractor must be independent, that is, left to use his own discretion as to the manner of executing the work, and the choice of laborers and agencies; a mere power of control, however, if not actually exercised, will not make the master liable for the acts of the contractor: *Norwalk Gas Light Co. v. Norwalk*, 63 Conn. 495; S. C., 28 Atl. Rep. 32. The direction of what shall be done, also, if not connected with control over the manner and means of doing it, does not alter the relation: *Morgan v. Smith*, 159 Mass. 570; S. C., 35 N. E. Rep. 101. (2) It is not enough

that the master should not knowingly employ one who is incompetent; he must exercise due care to select one who is competent and skilful: *Norwalk Gas Light Co. v. Norwalk*, 63 Conn. 495; S. C., 28 Atl. Rep. 32. If he employs a person known to be negligent, or to be in the habit of carrying on his work in a dangerous manner, he is liable: *Brannock v. Elmore*, 114 Mo. 55; S. C., 21 S. W. Rep. 451. (3) If the work to be done is in its nature dangerous, or injurious to others, the master cannot relieve himself from liability by delegating the performance of it to an independent contractor: *Colegrove v. Smith*, (Cal.), 36 Pac. Rep. 411; *Williams v. Fresno Canal & Irr. Co.*, 96 Cal. 14; S. C., 30 Pac. Rep. 961; *Brennan v. Schreiner*, 20 N. Y. Suppl. 130; *Ketcham v. Cohn*, 22 N. Y. Suppl. 181; S. C., 2 Misc. Rep. 427; *Pye v. Faxon*, 156 Mass. 471. Nor can he so delegate the performance of any duty he owes to the public, or to private individuals, as to escape liability: *Carrico v. West Va. Cent. & P. Ry. Co.*, (W. Va.), 19 S. E. Rep. 571; *Spence v. Schultz*, (Cal.), 37 Pac. 220; *Hanover v. Whalen*, 49 Ohio St. 69. (4) If the work done by an independent contractor is accepted and used when in an imperfect condition, the owner is liable for any injury caused by its defects: *Donovan v. Oakland & Berkeley Rapid Transit Co.*, (Cal.), 36 Pac. Rep. 516. There is a long annotation on this subject, in 31 AM. L. REG. 352.

The Supreme Court of Florida, in *Thiesen v. McDavid*, 16 So. Rep. 321, has very clearly stated the principle which control the right of a municipal corporation to enact penal ordinances, as follows: (1) That, unless forbidden by the constitution, the legislature can clothe the municipal governments with power to prohibit and punish by ordinance any act made penal by the state laws, when done within the municipal limits. (2) Such an ordinance is not invalid, merely because it prescribes the same penalties as the state law for the commission or omission of the same act. (3) It is no valid objection to such an ordinance, that the offender may be tried and punished for the same act under both the ordinance and the state law. (4) A

**Municipal
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Ordinances**

conviction or acquittal by the municipal courts, under such an ordinance, is no bar to a prosecution under the state law. (5) Such an ordinance is not invalid, merely because the trial thereunder is without a jury. (6) Nor is it invalid, because it excepts from its operation certain business pursuits that are not excepted from the operation of the state law on the same subject.

To the same effect is *Hunt v. City of Jacksonville*, (Fla.), 16 So. Rep. 398. See 1 AM. L. REG. & REV. (N. S.) 669, 869.

The question of the imputation of contributory negligence is one of frequent discussion; and presents itself in an unceasing variety of circumstances and relations. The Supreme Court of Georgia, in a very long and carefully considered opinion, has lately held, in *Atlanta & C. Air-Line Ry. Co. v. Gravit*, 20 S. E. Rep. 550, that (1) When a father entrusts his minor son of tender years to the care and custody of another, that person becomes the legal representative and agent of the father in discharging the duty which the law imposes upon the latter of guarding and shielding the child from injury; and accordingly, if the child, by reason of the gross negligence of his custodian, is run over by a passenger train and killed, such negligent conduct is, in law, imputable to the father himself; (2) Such a custodian cannot, however, be properly regarded as also the representative or agent of the mother of the child, since, in that state, the father is, by express statute, invested with the control of his minor children, and the mother is not accountable for the conduct of the custodian chosen for them by the father; and (3) In a suit by the mother in her own right as authorized by special statute, she is not chargeable with the negligence of the father, merely because of the conjugal relation existing between them. See 1 AM. L. REG. & REV. (N. S.) 314, 870; and an annotation in 32 AM. L. REG. 763.

According to a recent decision of the Supreme Court

of Florida, which follows the general rule on the subject, **Negotiable Instrument, Coupon, Interest** coupons payable to bearer, attached to a railroad bond, and representing the semi-annual instalments of interest accruing thereupon, are, in legal effect, promissory notes, and possess all the attributes of negotiable paper; they may be detached and negotiated separately by simple delivery, and may be sued on separately from the bond, after the bond itself has been paid and satisfied, as well as before; and when once detached and negotiated, they cease to be mere incidents of the bond, become independent claims, and carry interest after their maturity: *Trustees of Internal Imp. Fund v. Lewis*, 16 So. Rep. 325.

The Supreme Court of Iowa has ruled, that when a person induces another to sign a paper containing no writing, and **Instrument Void for Fraud, Bona Fide Holder** which is to be used merely as a means of identifying the signer, who does not intend to execute a note or contract of any kind, and then fills out the blanks so as to make the paper a note, the note will be void, even in the hands of an innocent holder; and such evidence is sufficient to warrant a finding that the note was forged: *First Nat. Bk. of Grand Haven v. Zrims*, 61 N. W. Rep. 483.

According to the Court of Appeals of Maryland, an agreement between two parties to farm on shares, one of whom is to expend a certain sum in the farming operations, **Partnership** does not constitute a partnership, though one of the parties spoke of it as such: *Ross v. Busher*, 30 Atl. Rep. 637.

The Supreme Court of North Carolina is of opinion, that a defendant in a criminal prosecution, who testifies in his own behalf and of his own accord, is guilty of perjury **Perjury, Testimony of Defendant** if he testifies falsely. He is to be treated the same as any other witness: *State v. Hawkins*, 20 S. E. Rep. 623. To the same effect are *Murphy v. State*, (Tex.), 26 S. W. Rep. 395; *Hutcherson v. State*, (Tex.), 24 S. W. Rep. 908.

Let the photographers beware how they decorate their windows! The Circuit Court for the District of Massachusetts has lately held, in *Cortis v. Walker*, 64 Fed. Rep. 280, (1) That it is a breach of contract and violation of confidence for a photographer to make unauthorized copies of a customer's photograph; and (2) That though a private individual may enjoin the publication of his portrait, a public character cannot, in the absence of breach of contract or violation of confidence in securing the photograph from which the publication is made; and (3) That one who is among the foremost inventors of his time is a "public character," within the above rule.

The Supreme Court of Kansas, in *Werner v. Grady*, 38 Pac. Rep. 482, has ruled that though in an action of replevin the measure of damages for the wrongful detention is ordinarily the interest on the value of the property while wrongfully detained, yet, when the property has a usable value, the value of its use while so detained is a proper measure of damages.

The Supreme Court of New York, Fourth Department, following the general rule, has recently held, that a manufacturer will be protected in the use of a geographical name, by which his goods are known to the public, as against another manufacturer, who uses the same name to designate a similar article, not for the purpose of describing the place where the goods are made, but for the fraudulent purpose of deceiving purchasers: *Gebbie v. Stitt*, 31 N. Y. Suppl. 102. There is an annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 514. See also 2 AM. L. REG. & REV. (N. S.) 30.

The Court of Appeals of Kentucky has just passed upon a most important question, under the Kentucky statutes, §1350, providing that all wage earners shall be paid for their wages in lawful money. A mining company paid its employees once each month, in lawful money, for the labor of the past month, and at any time

during the month, upon their application, issued checks to them, payable in merchandise at the company's store. The amount of checks so issued to each man was deducted from his wages on every pay day, and he was paid the balance in cash, but no money was paid for outstanding checks. This arrangement was held not to be a violation of the statute: *Arant Beattyville Coal Co. v. Comm.*, 28 S. W. Rep. 502.

This is hardly in accord with the weight of authority. In *Hancock v. Yaden*, 121 Ind. 366; S. C., 23 N. E. Rep. 253, a contract by an employe that he would receive his wages, or any part thereof, at the option of his employer, in goods from the latter's store, and expressly waived his right to be paid according to the statute of that state, was held to be absolutely void, and could not be pleaded as a bar to an action for the wages due the employe. In *State v. Loomis*, (Mo.), 20 S. W. Rep. 332, the defendant issued to his employe a coupon check book for \$5 in payment of his wages, which stated that the book was good for merchandise at the defendant's store, when presented by the employe; and it appeared that the amount of the coupons was deducted from the employe's wages and charged to him. This was held a violation of the act. But an order given to the plaintiff, for labor performed, directing another to pay him \$180, is not an evidence of indebtedness for wages, payable "otherwise than in lawful money of the United States," within the statutory prohibition: *Agre v. Smith*, 7 Wash. 471; S. C., 35 Pac. Rep. 370.

A statute similar to those in the above cases was held unconstitutional by the Supreme Court of Pennsylvania, in *Godcharles v. Wigeman*, 113 Pa. 431, why, no one knows, but ostensibly on the ground that it was an attempt to prevent persons *sui juris* from making their own contracts; the judge who delivered the opinion, (one from whom better things might have been expected,) saying with that tinsel-like speciousness of epigram that is so often foisted on the world in place of sound reason, that it was "an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States." But with all the deference

possible under the circumstances, one may well stop to inquire whether it is more degrading, to be forced to labor at wages barely sufficient to keep soul and body together, and then be compelled to accept goods at exorbitant prices instead of the needed money, or to be freed from that oppression, when unable to free oneself, even if it be by the exercise of a little paternalism. Certainly, most men would prefer to be the slaves of the public, rather than of a private individual or corporation. But tastes differ.

The Supreme Court of California, on the authority of *Archer v. McDonald*, 36 Hun. (N. Y.), 194, has recently decided, that a warehouseman, under a contract to store property for a certain time for a certain sum, cannot recover for storage where the property is destroyed, though without negligence on his part, before the expiration of the time: *Cunningham v. Kenney*, 38 Pac. Rep. 645. But when it is the custom of warehousemen to collect charges for storage only when the goods are ordered out, an accidental burning of them before they are ordered out will not release the owner from the payment of storage: *Jones v. Chaffin*, (Ala.), 15 So. Rep. 143.

Warehouseman.
Storage.
Charges for
Goods Destroyed

MANDAMUS AS A MEANS OF SETTLING STRIKES.

BY STEPHEN B. STANTON.

The great Brooklyn strike just ended, has added its contribution to strike law, in the shape of a further definition of the sphere of the writ of mandamus. However purposeless its short and disastrous history may seem, however lessonless it may appear to pass, yet, each strike, we may hope, in the wearying succession, adds its quatum to the gradually growing fund of strike law. The experience gained in one strike, makes the conduct of the next more intelligent, and its outcome more just; each brings us a step nearer the solution of the underlying problems, and the removal of the underlying evils. This hope is inspired chiefly by the ever increasing tendency of both sides, in labor controversies, to seek protection from the courts. Judicial intervention has already given us a jurisprudence of injunction as applicable to strikes, a legacy left by the recent great strikes of the West and Northwest. And now the Brooklyn trolley strikes have filled a like office with respect to the writ of mandamus.

Without going minutely into the history of the Brooklyn strike, suffice it to say, that the usual concomitants of a strike prevailed, lawlessness, disorder, violence and riot. Cars of the companies returned to the stables windowless; new "non-union" motormen, with broken heads, or not at all. The cutting of wires became a general pastime. The efforts of Brooklyn's entire police force, and 7000 State troops, proved unavailing as a preventive. The city authorities to lessen their responsibilities, advised the companies not to attempt running their full complement of cars. At this juncture, application was made to Judge Gaynor, of the New York Supreme Court, for a writ of mandamus, to compel the Brooklyn Heights Railroad Co., to resume the operation of its road. The writ was granted in its alternative form, and Brooklyn, I may say the country, was astounded to read in the learned judge's decision, the statement, that "the claim of violence, amounting to a prevention, is not legally made out.

Instances of violence, generally by others than the former employes of the company, are shown, but it is also shown that, not only the police force of the city, but also over 7000 soldiers are preserving order, and I cannot believe that this company is not protected in its rights. It is entitled to the full protection of the government in the performance of its public duties, protection on the one side, and obedience to law and duty on the other, being reciprocal, and going hand in hand. . . .

It has had such protection, and it now has it. I do not find that Government has failed in that respect at all. Instances of disorder have occurred, but have been speedily suppressed.

I cannot, therefore, attribute to government the failure of this corporation to perform its public duties. . . . That this corporation is not fulfilling its ordinary corporate duties to the public is not denied. It presented the issue to the court, that the reason for it is, that it is overcome by violence, and that the government does not adequately protect it.

This might be a sufficient answer in law, if true, but I refuse to find that either the judicial, or the executive branch of Government has failed in affording protection to this corporation. There is no evidence before me upon which I can cast such a reproach upon the State."

A few days later, a similar application was made to the same justice against the Atlantic Avenue Railroad Co., and was similarly disposed of by him on the same grounds.

A week before Judge Gaynor's decision, however, and before the situation had assumed the seriousness requiring the calling out of the First Brigade, in addition to the Second already on the scene, Judge Cullen, also of the Supreme Court of New York, had refused just such an application against the Brooklyn City Railroad Co., on the grounds that "the duty of the company to operate its road is to be exercised reasonably. In its operation, the company is absolutely entitled to the protection of the authorities, and to the protection of the court. The court cannot shut its eyes to the fact that assaults and violence have been committed, and that detachments of police are scattered all over the city. The com-

munity owes a duty of protection to the company in operation of its road.

As long as the acts of violence continue, the court certainly will not compel the road, by mandamus, to operate."

It does not here concern us to ascertain the cause of the wide discrepancy between the facts, as Judge Gaynor found them, and the facts; nor, further, why Judge Gaynor, in the very crisis of the strike, denied the existence of assaults and violence, to which Judge Cullen, in its beginning, had held, the court could not "shut its eyes." Had Judge Gaynor found the facts to be as they are generally believed to have been, it is clear, from his reasoning, that he would not have issued the writ.

But Judge Gaynor, and Judge Cullen, agree in stating the rule of law, that interfering mob violence releases a railroad from the public duty to maintain the operation of its road. And such, of course, is the law. Even as between railroads and private individuals, who can in no way be regarded as responsible for its existence, mob violence releases from liability. As for instance: "The fact that a railroad company has reduced the wages of its employes, cannot be held to justify or excuse a mob, composed of indiscriminate persons, in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay." (*P. C. & St. L. Rr. Co. v. Hollowell*, 65 Indiana, 195.) "Where employes suddenly refuse to work, and are discharged, and delay results, from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employes in refusing to do their duty, and this misconduct, in such case, is justly considered the proximate cause of the delay; but when the places of the recusant employes are promptly supplied by other competent men, and the strikers, then prevent the new employes from doing duty by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employes, but arises from the misconduct of persons for whose acts the carrier is in no

manner responsible: (*P., Ft. W. & C. R. R. v. Hazen*, 84 Illinois, 36.) To same effect, see *Grismar v. L. S. & M. S. R. R. Co.*, 102 N. Y. 563; *G. C. & S. F. Ry. Co. v. Levi*, 76 Texas 342; *Cogley on Strikes*, p. 353.

The case last quoted points out clearly the distinction between peaceable and violent strikes as affecting a carrier's ordinary contract liability toward shippers of freight. The ground of the carrier's liability in the former being found in the fact that the delay or damage caused by the strike is due simply to the cessation of work, which being an act or omission of employes, on the principle of *respondent superior*, the employer, the carrier, is responsible (see cases above cited and *Blackstock v. N. Y. & Erie R. R. Co.*, 20 N. Y. 48). We shall expect, therefore, the same distinction and rule of responsibility to be applicable to a carrier's duty toward the public or state, and so we find it. A railroad company is not excused from performing its public duty of maintaining and operating its road, simply because its men refuse to work at its terms and quit its employ. Judge Gaynor well stated the law in this connection to be as follows: "Railroad companies have duties to the public to perform, and they must perform them. If they cannot get labor to perform such duties at what they offer to pay, then they must pay more, and as much as is necessary to get it.

"Likewise, if the conditions in respect of hours or otherwise which they impose repel labor, they must adopt more lenient or just conditions. They may not stop their cars for one hour, much less one week or one year, to thereby beat or coerce the price or condition of labor down to the price or conditions they offer. . . . The company's duty was to have gone on, and now is to go on with its full complement of employes, having the right, gradually, and from day to day to supersede its employes, if it can, by new employes who will work on its terms, or to supersede them all at once when it has obtained a sufficient number of new employes for that purpose; but in such a controversy it has not the right to stop its cars while it is thus gradually getting other men." In the case of *People v. N. Y. Central & H. R. R. Co.*,

28 Hun. 543, quoted and followed by Justice Gaynor, the court issued a writ of mandamus to enforce exactly this public duty of the railroad. That was a case where it was not "shown that the workmen committed any unlawful act, and no violence, no riot and no unlawful interference with other employes" appeared. The cause of the strike was the refusal of the company to accede to the demand of its freight handlers for an advance of wages from \$1.70 a day to \$2. The total cost to the company of such increase in wages would not have amounted to more than \$300 a day, whereas its refusal to pay this was inflicting upon the commercial community a loss of millions of dollars. Furthermore, the company failed to procure other men competent or sufficient in number to take the place of the striking freight handlers, in consequence of which, for two weeks, the freight service of the railroad was practically suspended. The case thus presented every reason for the court's interference to frustrate this impudent attempt on the part of the railroad to save money at the expense of the community and to compel it peremptorily to restore its freight service. Said Presiding Justice Davis, in delivering the opinion of the court: "According to the statement of the case a body of laborers, acting in concert, fixed a price for their labor, and refused to work at a less price. The respondents (the railroad company) fixed a price for the same work, and refused to pay more.

"In doing this, neither did an act violative of any law or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid, and adhere to it, if they chose; but, if the consequences of doing so were an inability to exercise their corporate franchises, to the great injury of the public, they (the railroad company) cannot be heard to assert that such consequences must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes." The mandamus applied for against the railroad company accordingly issued.

This question arises, however, will the common carrier be compelled by mandamus to resume public traffic and travel where

these have been interrupted by a peaceable controversy in all cases with employes and under all circumstances? Judge Davis, in the New York Central strike case, just described, asked and answered this question as follows: "Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employes over the costs or expense of doing that? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost." In the Brooklyn City Railroad application Judge Cullen said "As between your company and the men, if the men are in a position to dictate terms there is no reason why they should not do so." Judge Gaynor uses equally unqualified language as to the railroad's duty and the court's scope of compulsion. Judge Emmons, in *Talcott v. Pine Grove*, 1 Flippen, 145, required every farthing of a railroad's "tolls first to be devoted to paying the public tax, and to the continuance of the road, its ample equipment and regular operation as the interests of the community, not those of shareholders, demand. No matter that a dividend is never paid, that the private investment is sunk and worthless, that the interest upon its bonds is not met, and that all its creditors go unpaid, every dollar of its earnings must nevertheless be applied to keep up its maximum efficiency, as required by the political powers in the law which created it. The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus." But if we consider that, under certain circumstances, mandamus to a railroad company to resume is equivalent to an order to take back its striking employes at their own terms, shall we not see that this wide rule needs qualification? Is it not apparent that then the merits of the labor controversy, the reasonableness of terms, becomes a subject of preliminary judicial inquiry? Suppose, for instance, a contemplated strike should be planned with such secrecy that the company has no notice of it until the men actually went out on strike. Suppose, further, that the terms for which the men struck were not only unreasonable but extortionate, and that the annual contracts with the men were about to be made. Of course,

on such sudden notice, men to fill their places would not be obtainable short of at least a day. Can it be law that, under these circumstances, the company must accede to the extortion of its striking employes because they are in a position to dictate terms," that it refuses so to accede at peril of its charter, and that acceptance of its employes' snap terms may be compelled by mandamus? That, be the terms of strikers never so extortionate, a railroad company is bound to submit to them, if they are only sprung upon it by the strikers with sufficient dexterity? The situation with which employes might thus confront the company, clearly does not represent the true condition of the labor market, nor serve as a standard of the just financial relations which should exist between employer and employed.

But let us suppose still further that "due and timely" notice of strike on the part of employes were required by law, that where the company had had no notice it was given at least a reasonable time by the court in which to procure other men and resume operation of its road, and that until such time the court would not compel the company by mandamus. Yet it would still be within the power of labor, by use of the writ of mandamus against the railroad corporation, to exact extortionate terms, even to ruin it. For instance, imagine labor to have become so well organized that it controls the entire labor force of the country. The employes of a railroad strike for exorbitant and ruinous terms. The company of course cannot replace the strikers even at just and reasonable rates. Mandamus to the company under such conditions would place it at the mercy of its men who might rifle its treasury at their pleasure under the guise of higher wages or shorter hours. The court would become an accessory to extortion. The law of free contract would give place to the highway law of the brigand when railroad employes might, with judicial sanction and aid, hold up a railroad with the challenge "Money or your corporate life!"

Yet such are not only the possible but the probable consequences of a rule which requires a railroad to maintain and operate its road "at whatever cost," and permits employes to "dictate terms" whenever they are in a position to do so.

One method by which the risk of injustice as above described can be avoided is by inquiry on the part of the court into the merits of the controversy, and when the terms demanded by the strikers as a condition precedent to resuming their employment are extortionate, fixing just and reasonable terms. Such was the conception of its duty by the Supreme Court of Montana in the case of *State ex rel. Haskell v. Great Northern Ry. Co.*, 36 Pac. Rep. 458. Application was made to it to compel the Great Northern Railway to resume the operation of its road. The controversy was occasioned by the general refusal of its employes to serve the company for the wages proposed to be paid. They therefore went out on strike awaiting an adjustment of the controversy. The petition alleged that sufficient, competent, skilful and experienced men are available, ready and willing to serve the railroad company in the operation of the railroad for reasonable compensation; and this was admitted to be the main predicate upon which the decision would turn. "It is proposed," said the opinion, "that the court shall inquire and determine what would be a schedule of reasonable wages for a corps of skilled and unskilled employes necessary to operate said railway, and then ascertain whether the requisite number of employes can be procured at wages determined, and if that fact is found to be true, as alleged, then command the operation of said railroad, under penalties attached to disobedience to the writ of mandamus. Those questions mentioned must be determined by the court upon proper inquiry whether the respondent should answer and traverse the allegations of the petition or no, because the court, before sending forth this extraordinary writ, will, by careful inquiry, become satisfied of its own jurisdiction, and that the conditions are such that the act commanded is feasible of performance. If the proposed scheme is feasible, it evidently affords a remedy going far towards the solution of a problem of great moment to all parties concerned."

It is not plain, however, upon what principle such an inquiry proceeds. Obviously, justice demands it, yet the duty of the road to run continuously and without interruption is

absolute. Nothing but the act of God or the public enemy excuses. And the mere fact that obedience to a writ of mandamus to compel performance of that duty causes the company loss, or even ruin, from extortion, is no obstacle to its issue. To this dilemma, we believe a fixing of the attention upon the railroad corporation solely and upon its duty to the public, leads. Widen our view, however, and the fallacy by which we have been thus misled is revealed, and a principle suggests itself by which we may escape from the dilemma. The breach of duty, calling out the mandamus against the railroad company, consists in the suspension of the operation of the road. This is caused as much by the striking employes as by the corporation, and is not to be laid at the door of the latter only. There are two parties to the operation of a railroad, and so there are two parties necessary to the performance of the act commanded by the writ of mandamus. Compulsion of the performance of this act must be by compulsion of both of these parties. "A corporation," said Judge Taft (in a case which see *infra*) "acts only through its officers and employes, and it is through them only that its action can be restrained or compelled. While doing the work of the company, the employe is the company." To compel one of the two parties only, is to discriminate in favor of the other against that one, and to take sides in the quarrel between them. A command that certain work be done can be made effectual only by being laid upon all persons whose participation in the work is necessary to its accomplishment. It is inefficacious, it is unjust, it smacks of the nature of impossibility which mandamus abhors, to order one to do an act, the doing of which depends upon the assistance of others whose will may not be within his control.

For these reasons a writ of mandamus to compel resumption of the operation of a railway should be directed to all whose participation and co-operation in such operation is necessary. Observe that we are, by this line of reasoning, inevitably led to the position that a writ of mandamus to be complete, to be just, indeed, in many instances to be possible of performance, must command the striking employes, as well

as the railroad company itself, to resume and continue the operation of the road.

Two objections at once present themselves. *First*, mandamus will not lie against private individuals like railroad employes, unless they hold some relation of agency or trust towards the public, and, except to compel performance of some public duty. *Second*, to direct the writ of mandamus to them as proposed, would be to deny their right to leave their employment at will.

Justice Harlan, in the case of *Arthur v. Oaks*, 63 Fed. Rep. 320 and 321, (U. S. Circuit Court of Appeals, Seventh Circuit, October 1, 1894,) decided, over-ruling Judge Jenkins, that railroad employes have the right, in a body, without notice, and at will, to leave their employment. Consequences to the public constitute no limit or bar to that right. In the face of such authority, it would, indeed, seem idle to regard the question as still open, were it not for the opposite view taken by Judge Jenkins in the court below, (*Farmer's Loan & Trust Co. v. Northern Pac. Ry. Co.*, 60 Fed. Rep. 812,) U. S. Circuit Court, Southern District of Wisconsin, April 6, 1894, and the important considerations and able reasoning upon which he founded his decision. The question came up before these learned justices in the form of an application for an injunction. And, in considering the matter of enjoining employes from leaving the employment of a railroad, the fact that such an injunction would, in effect, be a mandatory injunction to perform personal services, determined Justice Harlan against its issue. An injunction to perform personal services is, of course, without precedent in the law. Such compunctions flow naturally, from regarding the question as merely one of master and servant, in which the right of the servant to quit must be preserved inviolate. If we may say so without disrespect, the wider aspect of the question did not, with sufficient distinctness and force, present itself to the mind of the learned justice. By half closing his eyes to the important public relation and duty, which all who accept employment with a railroad company assume, he failed to find the ground upon which judicial interference would have been

warranted, and, if not a mandatory injunction, at least a writ of mandamus would lie. Granted, that a court may not command the performance of an act of personal service toward the railroad corporation, yet it may direct the performance of an act of public service and duty. The mere fact that the one involves the other, that to enjoin a strike, or to command strikers to resume or would-be strikers to continue work, is, in effect, an injunction or mandamus to perform personal service to their employer, should not deter. That is a mere incident. A mandamus to compel a railroad corporation to resume the operation of its road, is, in effect, an order to employ workmen, and in certain cases, (as see *supra*.) to employ a designated class of workmen, to wit, the strikers,—a matter with which, in its private aspect, the court has no authority to interfere, and in doing so, is depriving the corporation of one of the rights of an employer. Nevertheless, the courts have said: That is a mere incident. Your public duty warrants, public welfare demands our interference.

Justice Harlan could not have had this in mind when he said that "equity will not compel the actual, affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one, who, no matter for what cause, is not acceptable to him for service of that character," or again that "no court of equity will compel any managers against their will, to keep a particular employé in their employ." We have shown that equity will do this very thing in the case of a railroad employer by issuing its writ of mandamus under circumstances which must inevitably lead to this very result. We see, therefore, no reason why it should not similarly interfere with the corresponding right of railroad employés.

If the rights of an employer may thus be infringed, it is difficult to see why the right of an employé may not. If a railroad corporation may be bidden to abandon its prerogative of managing its own business in its own way, of employing whom it will, or no one, if it will, it is difficult to see why a railroad employé may not be bidden to abandon his prerogative of throwing up employment at will. If public welfare is

powerful enough to call for the subordination of private advantage in one case, it is equally powerful to call for it in another. As Judge Jenkins put it in the case of the *Farmers' Loan and Trust Co. v. N. P. Ry. Co.* (overruled in certain particulars by Justice Harlan on appeal), "their (employés') rights, as the rights of bondholders and stockholders, are subordinate to the rights of the public and must yield to the public welfare."

Justice Harlan held, modifying to this extent the injunction issued by Judge Jenkins, that a strike with the object and intent of crippling and embarrassing the operation of the railroad was not wrongful unless violence, intimidation and such like wrongs were resorted to, because only the exercise of an employé's lawful right to give up his employment at will. Is it not safer and better policy to say with Judge Jenkins that "a combination cannot be justified on the plea of the lawful exercise of a right when, the threatened abandonment of service is a mere pretext, the real intent and design being to cripple the property and to hinder and prevent the operation of the road, the necessary effect of which would be to inflict great loss upon the public;" that the right of a railroad employé to leave his employment must be exercised (quoting Judge Pardee) "peaceably and decently;" that "one has not the right arbitrarily to quit a service without regard to the necessities of that service."

The best argument for this view is found in the exigencies of the case then before Judge Jenkins, which he graphically describes, substantially as follows: "A large number of employés formed a combination to abandon the service of the Northern Pacific Railroad suddenly and without reasonable notice, with the result of crippling the operation of the railway and injuring the public. The skilled labor necessary to the safe operation of the road could not be readily supplied along 4,000 miles of railway. The difficulty of obtaining substitutes is intensified by the fact that no member of their organization would dare to take their place, for fear of the penalties of expulsion and social ostracism. If this combination had proved effective by the failure of this court to issue its preventive writ, this vast property would have been paralyzed in its

operation, the wheels of active commerce would have ceased to revolve, many portions of seven States would have been shut off in the midst of winter from the necessary supply of clothing, food and fuel, the mails of the United States would have been stopped, and the general business of seven States and the commerce of the whole country passing over this railway would have been suspended for an indefinite time. Are all these hardships and inconveniences to be submitted to, in order that certain of these men, discontented with the conditions of their service, may combine and conspire, with the object and intent of crippling the property of the railroad, to suddenly cease the performance of their duties?"

Justice Harlan concedes that great evils are, by his view of the law, allowed to continue; "but these evils," says he, "although arising in many cases from the inconsiderate conduct of employes and employers, both equally indifferent to the general welfare, are to be met and remedied by legislation restraining alike employes and employers so far as necessary adequately to guard the rights of the public as involved in the existence, maintenance and safe management of the public highways." If restraining there must be, alike to employes and employers, is it not well for the court to find and declare the ground upon which such needed restraint rests and adapt its wide equity powers to its accomplishment? The broad language of Judge Ricks sanctions such a course: "That the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient measures for relief essential is evident, and the courts in the exercise of their equity jurisdiction must meet the emergencies as far as possible within the limits of existing laws until the needed legislation can be secured."

In the case of *Toledo A. A. & N. W. Ry. Co. v. Penn. Co.*, (54 Fed. Rep. 746), Judge Ricks, and (in the same case and volume, p. 730, both decided in U. S. Circuit Court, Northern District of Ohio, W. D. March 25, and April 3, 1893, respectively), Judge Taft expressed views similar to those of Judge Harlan, with respect to the unenjoinable right of railroad

employés to leave their employment. But Judge Taft's expression of opinion was obiter, and the circumstances of the case before Judge Ricks were far different from those of the Northern Pacific case. The question before the latter was whether the court had power to punish for contempt certain employés who had left the employment of the railroad rather than comply with the injunction order of the court. Judge Ricks held that they could not be so punished, as that would be practically to construe the order as one forbidding them to leave the railroad company's employ or, inverted into its positive form, to continue in the service of the railroad. But he considered the question with reference only to the three or four employés then before the court. Their isolated acts in abandoning their employment involved no violation of public duty. *Non constat*, that other employés were ready to fill their places. In dealing with them the court was not dealing with a combination of employés to abandon the service of the railroad.

"An act," argued he, "when done by an individual in the exercise of a right may be lawful, but when done by a number, conspiring to injure or improperly influence another, may be unlawful. One or more employés may lawfully quit their employer's service at will; but a combination of a number of them to do so for the purpose of injuring the public and oppressing employés by unjustly subjecting them to the power of the confederates for extortion or for mischief is criminal. We do not, therefore, here determine that a conspiracy entered into by the employés of one railroad to boycott another railroad may not exist under such circumstances of aggravation as to make it entirely proper for a court of equity, in dealing with such conspiracy, to prevent an employé from quitting the service in which he is engaged, solely as a means of carrying out his part in such conspiracy, and for no other purpose than to aid in enforcing such boycott." "There certainly are times and conditions when" the employés right to quit work at will "must be denied."

That Judge Ricks would, in a similar case, incline to the position taken by Judge Jenkins, appears best from his own lan-

guage: Engineers and firemen "represent a class of skilled laborers, limited in number, whose places cannot always be supplied. The engineers on the Lake Shore & Michigan Southern Railroad, operate steam engines, moving over its different divisions 2500 cars of freight per day. These cars carry supplies and material, upon the delivery of which, the labor of tens of thousands of mechanics are dependent. They transport the products of factories, whose output must be speedily carried away, to keep their employés in labor. The suspension of work on the line of such a vast railroad, by the arbitrary action of a body of its engincers and firemen, would paralyze the business of the entire country, entailing losses, and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property be destroyed, the traveling public embarrassed, injuries sustained, too many and too vast to be enumerated. All these evil results would follow to the public because of the arbitrary action of a few hundred men, who, without any grievance of their own, without any dispute with their employer as to wages, or hours of service, as appears from the evidence in this case, quit their employment to aid men, it may be on some road of minor importance, who have a difference with their employer, which they fail to settle by ordinary methods. If such ruin to the business of employers, and such disasters to the thousands of the business public, who are helpless and innocent, is the result of conspiracy, combination, intimidation, or unlawful acts of organizations of employés, the courts have the power to grant partial relief, at least, by restraining employés from committing acts of violence and intimidation, or from enforcing rules and regulations of organizations, which result in irremediable injuries to their employers and to the public. It is not necessary, for the purposes of this case, to undertake to define with greater certainty the exact relief which such cases may properly invoke; but that the necessities growing out of the vast and rapidly multiplying interests following our extending railway business, make new and correspondingly efficient measures for relief essential is evident, and the courts, in the exercise of their equity jurisdiction, must meet the emergen-

cies as far as possible within the limits of existing laws, until needed additional legislation can be secured."

The relation of railroad employes to the public and the duties resulting from that relationship cannot, of course, be deduced from the same source as in the case of a railroad corporation. The act of incorporation and the acceptance of its franchise cannot devolve upon employes, who are not parties to them, the duties which they devolve upon the corporation itself. Nevertheless, the acceptance of employment under such a corporation is an acceptance to that extent of the benefits of such franchise. The employment must be deemed to be assumed by the employé with a view to its nature, its requirements, its obligations. "The primary duty of a railroad," said Judge Jenkins, in *Farmers' Loan and Trust Co. (supra)*, "is to the public. It must be kept a 'going' concern, although it prove an unremunerative investment. So also, employes on entering its service assume obligations co-extensive in kind with that of the corporation. Their rights—as the rights of bondholders and stockholders—are subordinate to the rights of the public, and must yield to public welfare." Every contract is deemed to be entered into in view of and with reference to the law of the land. The provisions of the law are regarded as entering into and forming part of the contract as an implied term. This is fully and ably stated by Judge Ricks in the Toledo case already adverted to: "Holding to that employer, so engaged in this public undertaking, the relation they did, they owed to it and to the public a higher duty than though their service had been due to a private person. They entered its service with full knowledge of the exacting duties it owed to the public. They knew that if it failed to comply with the laws in any respect, severe penalties and losses would follow for such neglect. An implied obligation was, therefore, assumed by the employes upon accepting service from it under such conditions, that they would perform their duties in such manner as to enable it not only to discharge its obligations faithfully, but also to protect it against irreparable losses and injuries and excessive damages by any acts of omission on their part. One of these implied

conditions, on their behalf, was that they would not leave its service or refuse to perform their duties under circumstances, when such neglect, on their part, would imperil lives committed to its care, or the destruction of property involving irreparable loss and injury, or visit upon it severe penalties. In ordinary conditions as between employer and employé, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. The remedy for breach of contract may follow to the employer, but the employé has it in his power to arbitrarily terminate the relations, and abide the consequences. But these relative rights and powers may become quite different in the case of the employés of a great public corporation, charged by the law with certain great trusts and duties to the public. The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes upon them obligations and duties commensurate with the character of the trusts committed to them."

In the case then before the learned justice, it was held that a railway employé is amenable to an injunction order issued to secure compliance with a requirement of interstate commerce law. If a railway employé, by virtue of his contract and the nature of his employment, assumes such a duty of compliance with the law, in that case, that he may be held to it by injunction, why he is not equally bound and why may he not be equally coerced with respect to the well-known law requiring continuous and uninterrupted operation of a railroad? This requirement is part of the law surrounding his employment with reference and in obedience to which a railroad employé contracts. To that extent then, he engages to maintain the uninterrupted operation of the railroad, and to that extent there devolves upon him the public duty to do so.

Railroad employés, said Judge Taft, in the case already cited, "are fully identified with the employer in the discharge of his public functions." "Corporations," to quote Judge Ricks further, "can act only through their officers, agents and servants, so that the mandatory provisions of the law, which apply to the corporation, apply with equal force to its officers and employés."

The writer believes that the public should be saved the inconvenience and the commercial paralysis consequent to railroad strikes, not by judicial intervention against one side to the controversy only, but against both sides. Injunction in form, this intervention should be, when undertaken before the strike and in contemplation thereof; thereafter in form of mandamus; but in both cases against both employer and employé, railroad corporation and railroad operators.

There need to be no fear for the practicability of this course on the score of the impossibility of making all employé parties, or of serving them with notice either of the application or of its allowance. These formalities have been decided to be unnecessary, and the court's order binding upon all officers and employés of the railroad, having actual knowledge of its existence and scope. (See the two Toledo cases, *supra*.) The deadlock, to end which is the public's concern and the court's ground of interference, is most effectively ended by controlling and coercing all implicated in it. It has been shown at the beginning of this article that a mandamus against a railroad corporation alone might result in forcing the corporation to employ strikers at their own terms. It will readily be seen that a mandamus or mandatory injunction against strikers alone would be an equal discrimination on the part of the court by forcing them frequently to work for the company against their will, at its terms. In directing a mandamus against both corporation and employés, discrimination in favor of either side of the labor controversy is avoided. But better still an opportunity, nay a necessity, of doing justice between them as regards the merits of the controversy is thus afforded to the court. If both company and employés are ordered by the court to cooperate in the resumption of operation of the railroad, some terms upon which they are to do so must from the necessities of the situation be prescribed. This involves a judicial inquiry into what terms are just, and as to whether employers' or employés' terms or some terms between the two are to govern.

The duty, the opportunity of judicial intervention in and regulation and prevention of strikes will thus at last be found.

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DEPARTMENT OF TORTS.

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TEXAS AND PACIFIC RAILWAY CO. *v.* SCOVILLE.¹ CIRCUIT
COURT OF APPEAL, FIFTH CIRCUIT. MAY 22, 1894.

The wanton and malicious use of the steam whistle of a locomotive by servants of a railroad company who are in charge of the locomotive, while it is in motion on a regular or authorized run, is an act within the scope of their employment so far as to charge the company with liability for injuries caused thereby. LOCKE, District Judge, dissenting.

The plaintiff, while riding on horseback along a public road running parallel with the railway of the defendant company, received serious personal injuries as a result of the fright of his horse, which was caused by the malicious blowing of a whistle by one of the defendant's servants in charge of a locomotive on the railway. The defendant sought to defend the action on the ground that a master is not responsible for a wanton, wilful, and malicious act, not done on the master's account or to further his interest, but committed exclusively for the servant's private ends, or maliciously. *Held*, that the company was chargeable with the results of the servant's act.

McCORMICK, Circuit Judge:—We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of a locomotive engine in charge of the proper servants of the company while engaged in pulling its regular trains, moving at schedule rate or schedule time, under direct, constant, telegraphic orders. If it is contended that, in this act, the servants were not in the master's service, because not employed to blow the whistle

¹ Reported in 66 Fed. Rep. 730.

wantonly and maliciously to frighten travelers or their horses, that contention is fully answered by the Supreme Court of Illinois,—that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability from all affirmative acts of these servants violating the rights of others: *Railway Co. v. Harmon*, 47 Ill. 298; *Railroad Co. v. Dickson*, 63 Ill. 151. It is conceded that, in case of passengers receiving injury from the action of the servants of the railroad company, no distinction between negligent and wanton and malicious conduct obtains. It is contended that, in such cases, the corporation is held because of its contract to carry safely. That is one reason, and a cogent one, for holding the company in such cases; but it is only one of the grounds for so holding. If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of carriers' agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and by the utmost care and diligence protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of any one in the lawful enjoyment of the state's peace. To say that the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it and motive for blowing it, in the indulgence of their love of mischief or other evil motive, they separate themselves, in and by that act and for that instant, from the company's service, is to refine beyond the line of safety and sound reason. Public policy and public safety require that the use of the steam whistle by those servants who are in charge of the locomotive,

and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of these servants, so far as to charge the company with liability therefor.

LIABILITY OF A MASTER FOR PERSONAL INJURIES TO THIRD PARTIES CAUSED BY THE WILFUL OR MALICIOUS ACTS OF HIS SERVANTS.

That a master is liable in damages to a third person who receives an injury from an act of a servant, which is authorized by the master, or fairly implied from the nature of the servant's employment, and the duties which are annexed, and incident to it, is a proposition of law which is well established and universally followed. The difficulty which has given rise to the great number of cases in all jurisdictions, has been in applying the proposition to the actual facts. Every class of employment and service presents a new set of conditions, and while it may be true that the master is liable to a third party for an injury caused by an act of the servant, committed by him while acting within the scope, and during the course of the employment, yet the very terms being variables, the line of demarcation is often hard to draw. The acts of servants which result in injuries to third persons, are divisible into two general classes, acts of omission, and acts of commission. As to the former, it has been long the rule that the master is liable for injuries caused thereby, and the question in each case simply reduces itself to a consideration whether the act was in reality within or without the scope of the particular employment. Originally the courts held, that for wilful acts, or acts of commission, the rule was different, and assigned as a reason for this, that by the very act of wilfulness, the servant, *ipso facto*, left the employment and became an independent *tortfeasor*. The case usually cited to substantiate this argument is *McMannus v. Cricket*, 1 East. 106. This was an action of trespass, in which the declaration charged that the defendant, with force and arms, drove a certain chariot against a chaise, in which the plaintiff was riding, by which the plaintiff was thrown out and injured. It appeared that the servant

of the defendant wilfully drove the chariot into the plaintiff, but that the defendant himself was not present, nor did he in any way, either expressly or impliedly, authorize or assent to the act, and on these facts, Lord Kenyon said: "It is a question of very general concern, and has been often canvassed, but I hope at last it will be at rest. . . . Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." The controlling element in the case is the absence of any authority, either express or implied, on the part of the servant, to do the act complained of; and while it is suggested by Lord Kenyon, that the act of the servant being a trespass, the master could not be held liable under such circumstances, nevertheless, the case merely decided that the master is not liable for a wilful wrong committed by his servant where there is a total absence of authority in the servant to do the act.

The early cases, both in England and America, which maintain or suggest the distinction of liability between negligent and wilful acts, are collected in *Wright v. Wilcox*, 19 Wend. 342. This was an action brought for an injury sustained by the son of the plaintiff in being run over by a wagon driven by S. Wilcox, the son of J. Wilcox, while in the employment of the father. The plaintiff's son was on his way to school, and asked S. Wilcox to permit him to ride, who answered that he might do so when he got up a hill which he was then ascending. When the hill was ascended, the lad took hold of the side of the wagon between the front and hind wheels. S. Wilcox did not stop his team, although cautioned by a bystander to do so, but looking back and seeing the plaintiff's son attempting to get on the wagon, he cracked his whip and put the horses upon a trot. The plaintiff's son fell, and the wheel passed over him. The plaintiff recovered in the court below, but on a motion for a new trial, Cowen J., reversing the decision, said: ". . . It is different with a wilful act of mischief. To subject the master in such

a case, it must be proved that he actually assented, for the law will not imply assent. . . . The law holds such a wilful act a departure from the master's business."

In *Puryear v. Thompson*, 5 Hump. (Tenn.), 396, the court carried the distinction between wilful and negligent acts to an extreme position. The plaintiff sought to recover the value of a negro boy who was killed by the overseer of the defendant while inflicting punishment for an offence. Puryear had instructed the overseer to "give the negro a good whipping—be sure and humble him before you let him down." The overseer whipped the negro severely, and as a result of the chastisement the latter died. The court held that if the overseer, in pursuance of the defendant's directions, intended only to chastise the negro until he should be humbled, and in the attainment of that object, so negligently and recklessly inflicted blows as to take the life of the negro, the defendant would be liable. But if he abandoned the purpose to chastise until the negro should be humbled, and employed instruments of torture to justify his malice, intending to kill the negro, in such case the defendant would not be liable.

Such an argument, however, is fallacious, and illustrates the fact that the confusion which has arisen with regard to wilful acts of servants, is due to a misapprehension. It may be true that, from the standpoint of the wrong-doer, the servant, the act was wilfully done, but from the standpoint of the master, the result is still an accident—one which the master may be liable for, because had he not employed the servant to achieve the result contemplated, the servant would not have desired to have accomplished the end, in the furtherance of which a wilful tort has been committed. "If the act is properly chargeable to the master, that is, if it can be fairly said to be his act and not the act of the servant, the motives, purpose or intention of the servant, cannot operate to shield the master from the consequences. If it was an act done in doing that which the master employed the servant to do, although done contrary to the master's will, against his instructions and without his knowledge, although unnecessary to accomplish the work, ill-advised, malicious, or wanton, he is liable, because

he has set in motion the agency which produces the wrong : "*Wood, Master and Servant*, § 303.

The case of *Wright v. Wilcox*, *supra*, has been generally discarded : *Weed v. Panama R. R.*, 17 N. Y. 362 ; *Mali v. Lord*, 39 N. Y. 384 ; *Isaacs v. R. R.*, 47 N. Y. 122 ; *Rounds v. R. R.*, 64 N. Y. 129, and cases subsequently cited.

In *Croft v. Alison*, 4 B. & A. 590, the court of King's Bench say that "the distinction is this ; If a servant, driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce an accident, the master will not be liable. But, if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment." The case showed that the defendant's servant had wilfully struck the plaintiff's horses, when driving his master's carriage, in order to extricate himself from an entanglement of the carriage caused by his own fault, and thereby had caused an injury to the plaintiff ; and a verdict for the plaintiff was supported. In *Seymour v. Greenwood*, 6 H. & N. 359, Chief Baron Pollock asks the question : "Suppose a servant, driving along a road in order to avoid a danger, intentionally drove into the carriage of another, would not the master be liable ?" and, in *Limpus v. London General Omnibus Co.*, 1 H. & C. 526, it was decided in the Exchequer Chamber that the master is responsible if the servant is in the course of doing the master's work, and does the act to accomplish it.

In *Howe v. New March*, 12 Allen 49, Hoar, J., states the true rule of liability to be this : "The master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the wrongful act. But, if the master gives an order to a servant which implies the use of force and violence to others, leaving to the direction of the servant to decide when the occasion arises to which the order applies, and the extent and kind of force to be used, he is liable if the servant in executing the order makes use of force in a manner or to a degree, which is unjustifiable. . . . If the

act be done in the execution of the authority given him by the master and for the purpose of performing what the master has directed, the master will be responsible whether the wrong done be occasioned by negligence or by a reckless or wanton purpose to accomplish the master's business in an unlawful manner." Cf., also, *Ramsden v. R. R. Co.*, 104 Mass. 117; *Wallace v. Express Co.*, 134 Mass. 95.

In *Eckert v. St. Louis Transfer Co.*, 2 Mo. App. 36, Bakeswell, J., said: "The question, in cases of this kind, is not whether the act of the servant is wilful or negligent. . . . The inquiry is, whether the act was done in the course of the servant's employment. The argument that when the servant acts wilfully he, *ipso facto*, leaves the employment of the master for the minute or so that this passion rages, is rightly characterized as a specious fallacy. . . . The master, in case of negligence or wilfulness, is liable, not so much for having impliedly authorized the act, as for having employed a faithless servant who did the injury in the course of his employment. Cf., also, *Priester v. Angley*, 5 Rich. L. (S. C.) 44; *Railroad v. Derby*, 14 How. (U. S.) 468.

It is in accordance with the proposition as laid down in this case that the majority of the cases have been decided; and it may be safely said that, while a different opinion does, to some slight degree, exist, yet the tendency certainly is to blend all the acts of servants which result in injuries to third persons under one head. Cf. *Fick v. Chicago, etc., R. R.*, 68 Wis. 469; *Mott v. Ice Co.*, 73 N. Y. 543; *Rounds v. R. R.*, 64 N. Y. 129; *Marion v. R. R. Co.*, 59 Iowa, 429; *Great Western Ry. v. Miller*, 19 Mich. 305; *Dickson v. Waldron*, 35 N. E. 1.

The question whether a wilful act is or is not within the scope of the servant's employment is, obviously, one which must depend upon the facts of each separate case which arises. As, however, the decision in the leading case suggests a consideration of the subject, it might be advantageous to group the cases in a more or less systematic manner, giving the facts of the more important cases, and referring to those consistent or inconsistent with them. It will be seen that the authorities are irreconcilable.

ACTS OF SERVANTS EMPLOYED ON STEAM RAILROADS.

Acts of Agents.

In *Fick v. Chicago R. R.*, 68 Wis. 469, a ticket agent left another employé in charge of the ticket office of the defendant company, who failed to return to the plaintiff the proper change upon the sale of a ticket; and after being asked therefor by the purchaser, assaulted and struck the latter. The company was held liable in damages. Cf., also, *McKernan v. R. R.*, 22 J. & S. (N. Y.) 354; *Christian v. Columbus & Rome R. R.*, 59 Ga. 460.

In *Mulligan v. New York, etc., R. R.*, 29 N. E. 952, the defendant's ticket agent, acting under a notice given him by police officials to look out for a counterfeit \$5 bill, and describing three men as passing the same, supposing a bill presented by the plaintiff to be a counterfeit, and the plaintiff, one of the persons described, ordered his arrest after accepting the bill in payment for a ticket. It was held that the company could not be held liable for the arrest, which proved to be false, since, if, in fact, the servant was acting within the scope of his duty, he would have refused the money for the property of his principal and would have refused to part with such property except upon receipt of what, at least, he believed to be good money.

Acts of Baggage-men.

In *Little Miami R. R. v. Wetmore*, 19 Ohio, 100, it appeared that the plaintiff after purchasing a ticket as a passenger, applied to the servant of the defendant company, charged with the duty of checking baggage, to have baggage checked, and by his abusive language towards the servant, provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff with a hatchet. It was decided that the act was outside of the servants' employment.

In *Rounds v. R. R.*, 64 N. Y. 129, the plaintiff, having gotten upon the platform of a baggage car of the defendants' road, was ordered to get off, as the rules of the company forbade all persons, except certain employés, to ride on the baggage cars. The plaintiff, hesitating to jump off while the car

was in motion, was kicked off by the servant in charge, and fell under the cars. The company was held liable. Cf., however, *Louisville, etc., R. R., v. Douglass*, 11 So. 933.

Acts of Brakemen.

In *Moody v. Texas, etc., R. R. Co.*, 23 S. W. 41, it was held, that the defendant company was not liable for the wilful act of a brakeman in kicking a trespasser from its moving train, whereby the trespasser was killed. Cf., also, *Alabama R. R. v. Harris*, 14 So. 263; *Towanda Coal Co. v. Herman*, 86 Pa. 418; *Faber v. Missouri, etc., R. R.*, 32 Mo. App. 378; *Marion v. R. R. Co.*, 59 Iowa, 429; *R. R. Co. v. Hendricks*, 48 Ark. 177; and Cf., *Texas R. R. v. Mather*, 24 S. W. 79; *Cain v. Minn. R. R.*, 39 Minn. 297. The plaintiff, a boy of 13, either attempted to board, or succeeded in boarding, a train moving over the defendant's railway. It appeared he had hold of the car-rail, with one foot on the step, and the other just leaving the ground, when the brakeman kicked him in the chest, breaking his hold upon the rail, whereby he fell, and the car passed over his leg. The company was held liable; *Molloy v. N. Y. Central, etc., R. R.*, 10 Daly, 453; *Heffel v. St. Paul R. R.*, 49 Minn. 263; *Kelly v. Kansas City R. R.*, 36 Kan. 655; *Smith v. R. R. Co.*, 23 S. W. 652; *Lucas v. R. R.*, 56 N. W. 1039; *Lang v. R. R.*, 4 N. Y. S. 565.

Acts of Conductors.

In *Ramsden v. Boston, etc., R. R.*, 104 Mass. 117, the plaintiff, a female, got into the defendant's cars, and paid the fare to the conductor, who later attempted to again collect the same, and upon a refusal to pay, committed an assault upon the plaintiff. The plaintiff recovered. Cf., also, *Paddock v. R. R.*, 37 Fed. 841; *Coleman v. R. R.*, 106 Mass. 1871; *R. R. Co. v. Anthony*, 43 Ind. 183; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23; *Wabash R. R. v. Rector*, 104 Ill. 296; *Jeffersonville R. R. v. Rogers*, 38 Ind. 116; *Baltimore & Ohio R. R. v. Blockett*, 27 Md. 277; *Hagen v. R. R. Co.*, 3 R. I. 88; *Moore v. R. R.*, 4 Gray, 465; *Winnegar's Adm. v. R. R.*, 85 Ky. 547; *Chicago R. R. v. Flexman*, 103 Ill. 546; *Pennsylvania R. R. v. Vandiver*, 42 Pa. 365; *Smith v. R. R.*, 24 N. E. 753.

The plaintiff got upon a freight car, and after it had started the conductor told him to get off. The plaintiff then offered to pay fare, but the conductor declined to take it, and gave the plaintiff a push, so that he had to jump to save himself and thereby incurred injuries. It appeared that the company had instructed its conductors that they should not allow any person to ride on any freight car. The court held the defendant company liable: *Holmes v. Wakefield*, 12 Allen, 580.

A conductor on the defendant's road finding that the car had been robbed, and suspecting the plaintiff's son to have committed the crime, walked up to him and killed him. It was held that the act was beyond the servant's employment, and that he alone was responsible in damages: *Cardiff v. R. R.*, 7 So. 601.

Acts of Engineers.

A railroad company was held liable in *Chicago R. R. v. Dickson*, 63 Ill. 151, for maliciously blowing a whistle whereby the horse of the plaintiff became unmanageable and the plaintiff was injured: Cf., also, *R. R. Co. v. Starrs*, 9 Heisk. 52. And in *R. R. Co. v. Harmon*, 47 Ill. 298, for maliciously allowing steam to escape, and thereby frightening the plaintiff's team of horses to his personal damage. For wilfully backing an engine towards a street car, whereby the plaintiff thinking a collision imminent, jumped out and was injured, the court held, in *Stephenson v. Southern Pacific R. R.*, 93 Cal. 558, that the plaintiff could not properly charge the company. Cf., also, in general: *Gulf, C. & S. C. R. Co. v. Kirkbride*, 15 S. W. 495; *Mars v. Canal Co.*, 8 N. Y. S. 107; *Fitzsimmons v. R. R.*, 57 N. W. 127; *Carter v. Louisville R. R.*, 98 Ind. 552.

Acts of Firemen.

In *Chicago, Burlington and Quincy R. R. v. Epperson*, 26 E. B. Smith (Ill. App.), 72, a fireman on the defendant's road, from mere wantonness, placed torpedoes under the cars and caused an injury to the plaintiff. The court held that the act was outside of the scope of the fireman's employment, and the company was not liable for his act: Cf., in general, *Flower v. Pennsylvania R. R.*, 49 Pa. 210.

Acts of Porters.

For assault of passenger by porter the company was held liable in *Dwinelle v. N. Y. C. & H. R. R. Co.*, 24 N. E. 319; Cf., also, *Williams v. Pullman Car Co.*, 33 American & English R. R. Cases, 414. For ejecting a passenger from a moving train, whereby the former was killed, the company was held liable in *Harlinger v. N. Y. C., etc., R. R.*, 15 Weekly Digest (N. Y.), 392. Cf., also, *Thorp v. N. Y. C. R. R.*, 76 N. Y. 402.

Acts of Watchmen.

Company held liable for act of a bridge watchman, who shot a trespasser on the bridge he was guarding: *Hackl v. Wabash R. Co.*, 24 S. W. 737.

Acts of Other Servants of Railroad Company.

In *Hewitt v. Swift*, 3 Allen 420, the evidence showed that one F was a servant of the company having charge of the freight in the depot at Charleston, and the plaintiff, a small boy, was playing there, and refused to leave; F thereupon removed him forcibly, and, in doing so, kicked him severely. The company was held liable. A company was held liable, in *Terre Haute, etc., Co. v. Jackson*, 81 Ind. 19, for wilfully drenching the plaintiff with water. Cf. for other illustrations of wilful acts in this connection: *Harriman v. R. R. Co.*, 45 Ohio, 11; *Ill. Cent. R. R. v. Ross*, 31 Ill. App. 170; *Northwestern R. R. Co. v. Hack*, 66 Ill. 328; *Nevin v. Pullman Car Co.*, 106 Ill. 222; *Denver R. R. Co. v. Harris*, 122 U. S. 597; *Wabash R. R. v. Rector*, 104 Ill. 296.

STREET RAILWAY COMPANIES.

Acts of Conductors.

In an action against a street railroad company for ejecting a passenger with unnecessary force, while the car was in motion, the company was held liable: *Chicago, etc., R. R. v. Pelletier*, 24 N. E. 770; *Pine v. St. Paul, etc., R. R.*, 52 N. W. 392; *New York, etc., R. R. v. Haring*, 47 N. J. L. 137; *Sandford v. R. R.*, 23 N. Y. 343; *Murphy v. R. R.*, 118 Mass.

228; *McKeon v. R. R.*, 42 Mo. 80; *Putman v. R. R.*, 55 N.Y. 108; *Passenger R. R. Co. v. Young*, 21 Ohio, 518; *Harman v. R. R. Co.*, 52 N.W. 830; *Savanah, etc., R. R. v. Bryan*, 12 S.E. 307; *Macken v. People's R. R.*, 45 Mo. App. 82; *Shaw v. 6th Ave. R. R.*, 62 N.Y. 180; *Kline v. Central R. R.*, 37 Cal. 400; *Schultz v. R. R.*, 89 N.Y. 242; cf., however, *Isaacs v. 3rd Ave. R. R.*, 47 N.Y. 122, where it appeared that the plaintiff, a passenger on the defendant's car, desiring to alight, passed out upon the platform and requested the conductor to stop the car and refused to get out until the car came to a full stop, whereupon the conductor threw her with force from the car, and she incurred injury. It was held that the act was not chargeable to the company. Cf., also, *Citizens R. R. v. Willocky*, 33 N.E. 627; *Drew v. 6th Ave. R. R.*, 26 N.Y. 49; *Hart v. R. R.*, 57 N.W. 91.

Acts of Drivers.

A passenger on a street car, to whom the driver had used profane language, replied that he would report the driver to the company at the office, which was at the stables of the company, where the car stopped for change of horses. Before reaching there the passenger got off the car, intending to go to the office, and the driver followed and assaulted him. It was held that the act of the driver was beyond the scope of his authority: *Central R. R. v. Pracock*, 69 Md. 259. Cf., also, *Chicago R. R. v. Mogk*, 44 Ill. App. 17; *Ryan v. R. R. Co.*, 1 J. & S. (N.Y.) 137; *R. R. Co. v. Donahoe*, 70 Pa. 119. Cf., however, *Wilton v. Middlesex R. R.*, 107 Mass. 108; *Lovett v. Salem R. R.*, 9 Allen, 557; *Kline v. R. R.*, 37 Cal. 400; *Hogan v. Ry. Co.*, 124 N.Y. 647; *Hestonville R. R. v. Biddle*, 112 Pa. 551.

Where a driver wilfully had a passenger arrested the company was held liable: *Lafayette v. Rwy. Co.*, 8 So. 701, and cf. similarly: *Winneger's Adm'x. v. R. R.*, 85 Ky. 547.

So, also, the company employing a driver who purposely ran into a plaintiff while driving a carriage, has been held liable on the ground that the act was one within the line of employment: *Cohen v. Dry Dock R. R.*, 69 N.Y. 170.

STEAMBOAT COMPANIES, FERRIES, ETC.

Where a mate on a ship found a man who had taken deck passage, on some bales of moss, and, ordering him off, kicked and otherwise assaulted him, the company was held responsible for the act: *Springer Transportation Co. v. Smith* 16 Lea. (Tenn.) 498. Cf., also, *Hamel v. Ferry Co.*, 6 N. Y. S. 102; *Scanton v. Suter*, 158 Pa. 275; *Coger v. Northwestern Packet Co.*, 37 Iowa 145; *Pendleton v. Kingsley*, 3 Cliff. (U. S.) 416; *Block v. Bannerman*, 10 La. An. 1.

Where it appeared that the plaintiff was a passenger on a steamboat, and was assaulted by a clerk whose duty it was to collect fares or passage money, and who claimed that the plaintiff had hidden to escape payment, and upon a denial assaulted the plaintiff and put his eye out, the company employing the servant was held liable: *Shirley v. Billings*, 8 Bush. 147. Cf., also, *Bryant v. Rich*, 106 Mass. 180.

VARIOUS OTHER INSTANCES.

In *Mott v. Ice Company*, 73 N. Y. 543, the plaintiff, while driving, was run into and injured by a wilful act of the driver of an ice cart belonging to the defendant. The lower court dismissed the complaint on the ground that the act which caused the injury was wilful, and therefore beyond the employment of the servant. This the Supreme Court reversed.

Where the servants of an inn-keeper assaulted and injured the plaintiff, who was living at the hotel, the owner was held liable: *H'adc v. Thayer*, 40 Cal. 578. Cf., *Curtis v. Dinneer*, 30 N. W. 148.

Where a bartender of defendant's saloon injured the plaintiff by forcibly and wantonly ejecting him, while intoxicated, from the saloon, its proprietor was held liable in damages: *Brazil v. Peterson*, 46 N. W. 331. Cf., *Fortune v. Trainer*, 19 N. Y. S. 598.

For the wilful act of a servant in causing arrest of a customer, a storekeeper has been held liable: *Geraty v. Stern*, 30 Hun. 426; *Staple v. Schmid*, 26 At. 193; *Hershey v. O'Neill*, 36 Fed. 168. Cf., however, *Mali v. Lord*, 39 N. Y. 381; *Porter v. R. R. Co.*, 41 Iowa, 358; *Meehan v. Moreland*, 5 N. Y. S. 710.

For an example of an assault by a servant of a theatre proprietor, for which the latter was made to respond in damages :
Cf., *Fowler v. Holmes*, 13 N. Y. S. 816; *Dickson v. Waldron*,
35 N. E. 1.

THOMAS SOVEREIGN GATES.

Philadelphia, February, 1895.

DEPARTMENT OF EQUITY.

EDITOR-IN-CHIEF,

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CORLISS v. E. W. WALKER Co.¹ UNITED STATES CIRCUIT
COURT, DISTRICT OF MASSACHUSETTS.

A court of equity has no jurisdiction of a suit to restrain respondents from publishing a biography of complainant or a member of complainants' family, where such person is a public character, *e. g.*, one who holds himself out as an inventor, and whose reputation as such becomes world-wide.

This was a suit by the widow and children of G. H. Corliss, to enjoin the publication and sale of a biographical sketch of the deceased. Judge Colt placed his opinion upon two grounds. He maintained that the foundation of the jurisdiction of a court of equity is civil property, and that, therefore, such court has no jurisdiction to restrain even defamatory publications, and still less, such publications as that in the present case, which was not even suggested to be libelous, or even untrue.

To quote from the opinion :

"The bill does not allege that the publication contains anything scandalous, libelous or false, or that it affects any right of property, but the relief prayed for is put upon the novel ground that such publication is an injury to the feelings of the plaintiffs and against their express prohibition. The counsel for plaintiffs put their case upon the ground that Mr. Corliss was a private character, and that the publication of his life is

¹ Reported in 57 Fed. Rep. 434.

an invasion of the right of privacy, which a court of equity should protect. . . . I cannot assent that Mr. Corliss was a private character. He held himself out to the public as an inventor, and his reputation became world-wide. He was a public man, in the same sense as authors or artists are public men. It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their consent while living, or the approval of their family when dead. But whether Mr. Corliss is to be regarded as a private or public character (a distinction often difficult to define) is not important in this case. Freedom of speech and of the press is secured by the Constitution of the United States and the constitutions of most of the States. This constitutional privilege implies a right to freely utter and publish whatever the citizen may please, and to be protected from any responsibility for so doing, except so far as such publication, by reason of its blasphemy, obscenity or scandalous character, may be a public offence, or by its falsehood and malice, may injuriously affect the standing, reputation or pecuniary interests of individuals: Cooley on Constit. Law (6 Ed.), 578. In other words, under our laws, one can speak or publish what he desires, provided he commits no offence against public morals or private reputation."

INJUNCTIONS AGAINST PUBLICATIONS INTRUDING UPON PRIVACY.

Four years ago, in an article entitled "The Right to Privacy," in 4 *Harvard Law Review*, 193, this entire subject was very admirably and exhaustively discussed.

The view there advanced, and ably maintained, was that the right to privacy is a legal right, distinct from the rights of property and of reputation; and that this right should be enforced by the courts, either in an action for damages, or, in a proper case, by an injunction to prevent the publication of anything which unjustifiably intrudes upon privacy.

This article leaves little to be said, and it is here proposed only to consider the cases which have been decided since it was written, presenting, as they do, a difficulty not discussed in the article, a new stumbling block in the way of the enforce-

ment of this right by injunction, namely, the constitutional provision for the "freedom of the press."

The reasoning of the above-mentioned article has received judicial approbation in two New York cases.

Schnyler v. Curtis, 30 Abb. N. C. 376; 24 N. Y. Supp. 512 (1893), was a case where an injunction was granted, at the suit of the near relatives of a deceased person, to restrain the erection and exhibition of a statue of the deceased, it being established that the exhibition would cause the complainants pain and distress. The injunction was granted because the injury was permanent or continuing in its nature, and, unlike a libel, it would be impossible to ascertain the damage which might be caused.

In other words, the court of equity intervened, because otherwise the complainants would have been left without any remedy.

In *Marks v. Jaffa*, 26 N. Y. S. 908, (1893), the principle was extended to the granting of an injunction against the publication of a picture of the plaintiff in a newspaper, with an invitation to readers of the paper to vote upon the question of the popularity of plaintiff as compared with another person, whose picture was also published.

The court there referred expressly to the article in the *Harvard Law Review*, and said: "The action may seem novel, but there can be no question about the plaintiff's right to relief, irrespective of the amount of damages he might recover at law (citing *Schnyler v. Curtis*, *supra*). If a person can be compelled to submit to have his name and profile put up in this manner for public criticism, to test his popularity with certain people, he could be required to submit to the same test as to his honesty, or morality, or any other virtue or vice he was supposed to possess. Such a wrong is not without its remedy. No newspaper or institution, no matter how worthy, has the right to use the name or picture of any one for such a purpose without his consent. . . . Private rights must be respected, as well as the wishes and sensibilities of people. When they transgress the law, invoke its aid, or put themselves up as candidates for public favor, they warrant criticism,

and ought not to complain of it; but where they are content with the privacy of their homes, they are entitled to peace of mind and cannot be suspended over the press-heated gridiron of excited rivalry and voted for against their will and protest."

The case of *Schuyler v. Curtis* was urged in argument in the principal case, but was dismissed by the court with the remark that it was not in point—that the right of publication was not there in question.

Indeed, this view seems to be borne out by the words of Ingraham, J., (30 Abb. N. C. 376): "Nor does the act of these defendants come within the provision of the State Constitution which secures to each citizen the right to freely speak, write and publish his sentiments on all subjects. The defendants can freely speak, write and publish their sentiments as to Mrs. Schuyler without exhibiting her statue to the public."

It would seem a trifle difficult to distinguish, in principle, between the erection of this statue, and the printing of a portrait in a newspaper. Should this last be regarded as within the privileges secured by the "freedom of the press?"

In *Marks v. Jaffa* (*supra*), apparently, the point was not raised.

If the publication of a portrait can be restrained, why not, also, a printed description of a person or of his life?

But this further step, the court, in the principal case, refused to take.

It remains to consider the two grounds for this refusal.

First, equity will only intervene in cases where property rights are concerned. An injunction will not be issued to restrain even a libelous publication.

This proposition is supported by a long list of authorities: *Kidd v. Harry*, 28 Fed. Rep. 773; *Boston D. Co. v. Florence*, 114 Mass. 69; *Whithead Co. v. Kitson*, 119 Mass. 484; *N. Y. Juvenile, etc., Co. v. Roosevelt*, 7 Daly, 188; *Mangher v. Dick*, 55 H. Pr. 132; *Life Assn. v. Boogher*, 3 Mo. Ap. 173; *Southey v. Sherwood*, 2 Met. 435; *Geer v. Pritchard*, 2 Swanst. 402; *Mulkern v. Ward*, L. R. 13 Eq. 619; *Lawrence v. Smith*, Jacob. 471; *Westmore v. Scovell*, 3 Ed. Ch. (N. Y.) 515; *Fisher v. Apollinaris Co.*, L. R. 10 Ch. 297;

Prudential Ins. Co. v. Knott, 10 Ch. Ap. 142; *Mayer et al. v. Journeymen Stone Cutters' Assn.*, 20 Atl. 492 (N. J., 1890); *Townshend on Slander and Libel*, 4th Ed. 417 a., *et. seq.*, and notes, with cases there cited; *High on Injunctions*, 3d Ed., § 1015; *Kerr on Injunctions*, *502.

The English cases to the contrary, have either been disapproved by later decisions, or else seem to be based upon special statutory provisions, extending the jurisdiction of the court of chancery. See *Dixon v. Holden*, L. R. 7 Eq. 488; *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Prudential Ins. Co. v. Knott* (*supra*); *Thorley's Cattle Food Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, Id. 864; *Loog v. Bran*, 26 Ch. Div. 316; *Bradley, J.*, in *Kidd v. Horry* (*supra*).

The case of *Croft v. Richardson*, 59 H. Pr. 356, where an injunction was issued against the publication of a trade-libel, seems to stand alone, and is based upon insufficient authority.

In *Brandreth v. Lance*, 8 Paige, 24, the court said: "The utmost extent the court of chancery has ever gone in restraining any publication, has been upon the principle of protecting the right of property." Since *Schuyler v. Curtis* and *Marks v. Jaffa*, this is no longer true; those cases have furnished precedents, if no more.

The court in *Singer Co. v. Domestic Co.*, 49 Ga. 70, stated the law in clear and unmistakable terms:

"The general rule is that to get an injunction you must show the infringement of a property right. It is well settled that an injunction will not be granted to restrain slander or libel of title or reputation: 6 Simm. 297; 11 Beav. 112; 11 Simm. 582. Not that it is not wrong, not that the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law. Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy. Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs, wrongs recogniza-

ble and capable of redress at law, that yet are not such wrongs as a court of equity will enjoin. Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule. It is true that courts of equity constantly refuse to lay down any absolute limitation to their power to issue this writ. But this only means that cases coming within the principles on which the court has long acted, are not beyond its power simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable, expected injury to property right."

Such language prompts a fear that the doctrine of the principal case is the true one, that the mere absence of any other remedy is not enough to warrant the intervention of equity, and that the New York courts, in their desire to accomplish a salutary purpose, have overstepped the legitimate bounds of their jurisdiction, and entered the political field.

Turning to the other ground of Judge Colt's opinion, the question is whether the constitutional protection of the "freedom of the press" presents an insuperable obstacle to the use of the injunction to restrain publications.

A collection of the provisions of the various State Constitutions will be found in Cooley's *Constitutional Limitations*, 510, n. 1. That of New York, Art. I, § 8, is typical: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."

There can be no question that the real motive for the insertion of such provisions in the various constitutions, as in that of the United States, was to prevent a political censorship of the press, to leave all matters of public interest and importance open for free discussion, and not to force upon private individuals a distasteful publicity at the hands of gossiping newspapers, leaving them to the very cold comfort of an action at law for damages.

See *Comm. v. Blanding*, 3 Pick. 304; *Respublica v. Dennis*, 4 Yates, 267; *Jones v. Townsend*, 21 Fla. 431.

If the existence of the legal right to privacy be granted, then

this constitutional provision, literally construed, must make justice a mockery in many instances ; for it is obvious that the only possible safeguard against unwarrantable publications is by way of prevention, and that for most of them, damages would be no recompense at all, even if a court of law had power to award such damages.

Yet, there stands the provision, and, thus far, it has not been explained away.

In *Marks v. Jaffe* (*supra*), the constitutional question seems to have been ignored ; in *Schuyler v. Curtis* (*supra*), it was avoided by a strict interpretation of the word "publication;" while in the principal case it furnished a conclusive argument against the granting of the relief sought for.

A decision from the court of some other State will be awaited with great interest.

S. D. M.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E. Ellis, Esq., 736 Chestnut Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

THE LAW OF MUNICIPAL CORPORATIONS, with Forms and Notes of the Decisions of the Supreme and other Courts of Ohio relating thereto. Fourth Edition. By HIRAM D. PECK. Cincinnati: The Robert Clarke Co. 1894.

SOCIAL GROWTH AND STABILITY. A Consideration of the Factors of Modern Society, and their Relation to the Character of the Coming State. By D. OSTRANDER. Chicago: S. C. Griggs & Co. 1895.

RULES OF EVIDENCE AS PRESCRIBED BY THE COMMON LAW FOR THE TRIAL OF ACTIONS AND PROCEEDINGS. By GEORGE W. BRADSTER. Chicago: Callaghan & Co. 1895.

HANDBOOK OF CONSTITUTIONAL LAW. By HENRY CAMPBELL BLACK. St. Paul: West Publishing Co. 1894.

THE FEDERAL INCOME TAX EXPLAINED. By JOHN M. GOULD and GEORGE F. TUCKER. Boston: Little, Brown & Co. 1894.

INCOME TAX LAW OF 1894. Paragraphed, Explained and Digested. By JOHN A. GLENN. Philadelphia: T. & J. W. Johnson & Co. 1895.

THE COMMON LAW; its Origin, Sources, Nature and Development, and What the State of New York Has Done to Improve Upon It. By CHARLES P. DALY, LL.D. New York and Albany: Banks & Bros. 1894.

NATIONAL CORPORATIONS. By J. J. H. HAMILTON. Reprinted from University Law Review.

THE LAW OF VOLUNTARY SOCIETIES, MUTUAL BENEFIT INSURANCE AND ACCIDENT INSURANCE. By WILLIAM C. NISBET. Chicago: Callaghan & Co. Second Edition. 1894.

SELECTED CASES, ETC.

CASES ON CONSTITUTIONAL LAW. Part III. By JAMES BRADLEY TRAYER, LL.D. Cambridge: Charles W. Sever. 1894.

PAMPHLETS.

LICENSE LAWS. All License Laws Restricting Interstate Commerce are Unconstitutional. J. A. Shepard, Publisher, Chicago.

THE QUIZZER SERIES. Nos. 12 and 13. Being Questions and Answers on Partnership and Agency. By WILLIAM C. SPRAGUE. Collector Publishing Co., Detroit, Michigan.

BOOK REVIEWS.

A TREATISE ON GENERAL PRACTICE, containing Rules and Suggestions for the Work of the Advocate, in the Preparation for Trial, Conduct of the Trial, and Preparation for Appeal. By BYRON K. ELLIOT AND WILLIAM F. ELLIOT. In Two Volumes. Indianapolis and Kansas City: The Bowen-Merrill Co. 1894.

In the two volumes of this substantial work, the authors have endeavored to give, not merely a compendium of the practice and procedure in the courts, but also the steps necessary to enable the advocate to thoroughly prepare his case before trial, and carry it to a successful issue. It is, therefore, a work on preparation, almost as much as on practice, and bears the same relation to the latter subject that Wood's Practice Evidence bears to the various technical works on evidence. But it derives its chief value from this very fact, that it presents the subject of the management of a case from a new and often disregarded point of view, yet one that is of the very highest importance. A work on Practice, as generally understood, is necessarily but a re-hash of material already worked into mince-meat, while this book introduces us to a much neglected, if not entirely new field of study. There are plenty of attorneys who can conduct a case on paper, who fail lamentably to manage it successfully before a jury, simply because their knowledge on the subject is all technical, lacking the practical element that is absolutely essential to success in dealing with men. The mere knowledge of what steps one should take is of little value, unless he knows also when and how to take them; and that it is one of the aims of this work to teach.

It is always difficult, in reviewing a new book, and this is to all intents and purposes new, although, as the authors state in their preface, it is an enlargement of a former work,) to point out its special excellencies, if it is really deserving of praise;

and it is safer to confine one's self to general commendation. Yet, in this case, it may be permissible to call attention to a few of the many valuable suggestions on points too often disregarded by the practitioner. The authors strongly emphasize the necessity of a thorough understanding of legal principles, (which by the way, would not be a bad thing for some judges,) and maintain that the man who has not fitted himself to conduct causes in judicial tribunals by a long course of study of the principles of jurisprudence, is not an advocate. This is sadly at variance with the present fad of "case-law," which the publishers would fain have us believe is the *sine qua non* of success, forgetting that the only way of knowing whether or not cases are parallel is by ascertaining whether or not they rest on the same principles.

On the other hand, we are reminded, that it is no less important to remember, that mere knowledge of principles will not necessarily enable a man to impress his views upon others; and especially, if he uses language that is too technical to be understood by ordinary men. Cases are often lost by the failure of the advocate to present his position to the jury in an intelligible manner. And to this end the client's opinion of the bearings of his case is of great value, as enabling the advocate to realize the practical light in which the case is to be regarded, and in which it should be presented to the jury.

One other, and perhaps the most valuable, feature of the work, is the strenuous insistence upon the duty of the advocate to preserve his honor and integrity; matters often disregarded in the effort to succeed, and which have always and are still contributing to bring disrepute upon the profession. The language in which this is presented, *apropos* of coaching witnesses, is very forcible. "The client may have a right to his [the advocate's] talents and skill, but not to his conscience and integrity. Nor will a departure from the path of honor lead to good results, for no man that really possesses the character and talents requisite to a true advocate can justly and ably present a cause where he knows that he has corruptly engaged in the fabrication of testimony. A guilty con-

science weakens power, and the advocate who must praise a witness can only do so with half a heart, when he knows that he is in league with him in a criminal scheme. Power and guilt are seldom allies."

It would be impossible, however, to designate all the points of excellence in this work; and one may as well stop at one place as another. Suffice it to say, that it is indispensable to any one who wishes to gain a clear understanding of the practical, as distinguished from the theoretical side of practice, without which understanding success as an advocate is impossible. It can be gained by experience; but experience is a hard teacher, and it is far better to learn by the experience of others. That is furnished in this book, and not merely in general rules, but in many specific instances in the notes, which contain most interesting examples of the successful practical handling of a case.

R. D. S.

THE STUDY OF CASES. By EUGENE WAMBAUGH, LL. D.,
Professor of Law in Harvard University. Second Edition.
Boston: Little, Brown & Co. 1894.

CASES FOR ANALYSIS. By the same Author. Boston:
Little, Brown & Co.

These little volumes in the "Students' Series," deserve to be numbered among the most valuable publications for the use of students which have appeared in recent years. Professor Wambaugh (to use his own language) aims "to teach students the methods by which lawyers detect *dicta*, and determine the pertinence and weight of reported cases." In each of the two works, the subject matter is divided into two parts or books. In the one, a "General View," is followed by a collection of some seventeen selected cases for study and analysis, and in the other, a "A Selection of Cases on Contracts," is succeeded by "A Selection of Cases on Torts."

In his General View, Professor Wambaugh first disposed of some preliminary topics, and then considers the best method of finding the doctrine of a given case. Four elements are recognized as entering into the solution of this problem. The

first is the court's duty to decide the very case before it. The second is the court's duty to follow a general rule. The third is the opinion of the judges (in connection with which the author discusses *dicta* and their weight); while the fourth element depends upon the principle, "that a case is not a precedent for any proposition that was neither consciously nor unconsciously in the mind of the court."

The work abounds in fertile suggestions, and there seems to be no portion which the student cannot study with advantage. In Chapter IV, he will learn "How to Write a Head Line." In Chapter V, he will receive many valuable suggestions on "How to Criticise Cases." Chapter X, on "Reports," is also to be commended, and on pages 130 and 131 (in Chapter XI, on "Digests"), will be found some acute observations upon the requisites of a satisfactory digest classification.

In the second work—the Cases for Analysis—the student will find ample material for practice, in reading and stating reported cases composing head notes and briefs, criticising and comparing authorities, and compiling digests. The selected cases are, for the most part, familiar to the practicing lawyer. *Adams v. Lindsell*, *Byrne v. Van Tienhoven*, *Carlill v. Carbolic Smoke Ball Co.*, *Cooke v. Oxley*, *Rylands v. Fletcher*, *Trevor v. Wood*, and *Winn v. Bull*, are among those which catch the eye upon a casual examination.

At a time like the present, when the method of teaching law by the study of cases, instead of by treatise and text book, is slowly, but surely, winning recognition for itself on every hand, the appearance of volumes such as these, is an event of no small importance in the world of legal education. The fact that a second edition of "The Study of Cases, has already been called for, seems to indicate that Professor Wambaugh is meeting with the encouragement which he deserves.

G. W. PIERCE.

COMMUNICATIONS.

THE OCCUPATION OF COUNTRY HIGHWAYS BY ELECTRIC RAILROADS.

Editor of American Law Register and Review.

SIR:—The annotation by Mr. Matlack on the subject of "Electric Railroads Upon Public Highways," which you published in the January number of your magazine,* has made its appearance at a very opportune time. It is only to be regretted that owing to the technical character of that form of contribution, the writer could not discuss the subject in a more general way, especially with regard to a phase of the question which, owing to the new conditions so suddenly and so extensively developed, has grown to be a most important one; I mean the building of electric railroads on country roads. For, although the matter of passenger railways in the streets of a city will always attract attention, the law, or rather the application of the law to the conditions which there exist, is comparatively well settled and understood.

There has recently grown into existence a state of affairs which, while it may not mean much to one who resides or owns property exclusively in the city, threatens to infringe the rights and privileges of the owner of land in the rural and suburban districts, and to usurp those of the steam railway companies.

The sudden development of electricity as a cheap and rapid motive power, and its commercially successful application to the lines of city passenger railroads, formerly operated by horses, suggested the construction of many additional lines, which, under the former means of transit, it would not have paid to build. From this the idea extended, as it became evident that not only could the new power be successfully applied within the streets of the city proper, but that the out-lying or suburban districts, which before had been compelled

to depend upon a, perhaps, not very accessible steam railroad, could also be included in the benefits of the new system. Further still the idea has been carried, until finally suburb has been connected with suburb, and town with town, until a veritable network of electric railroads threatens to spread web-like over the country.

Now, not having the power of eminent domain, and being unable or unwilling to face the expense of buying the right of way over private property, these railway companies have simply followed the example of the "street" (city) railways, and, acting ostensibly under the laws which were intended only for the latter, have laid their tracks on the public highways. Of course before doing this, the consent (in Pennsylvania), of the local authorities must be obtained. The local authorities in the country are the Supervisors, who have absolute power to decide whether or not a railway of the kind shall obtain an entrance upon the roads of their jurisdiction, and if so, which particular road shall be occupied. It cannot be wondered at, when the ignorant and slovenly character of the individuals, who, as a rule, fill these offices is considered, that in the first flush of the new craze, many of the finest as well as many of the most unsuitable (viewed from the side of the public) highways have been literally given over to the railroads, and that without the slightest compensation to the townships or to the adjacent property owners, or the compliance with any conditions or regulations for the construction and operation of the roads. The result is that roads which were formerly scarcely wide enough for two vehicles to pass, are now occupied by an overhead ("trolley") electric railway, with its poles placed along either side, with its hastily constructed road bed, the laying of which has, in many instances, ruined the remainder of the highway's surface, and its cars run at a rate of speed approaching that of a steam railway, and stopping only where the convenience of the company suggests. The tracks are usually laid along the side of the highway and close to the fence or hedge of the abutting property owner, who is thus compelled to cross them whenever he drives in or out of his place. If, on the other hand, his house stands close

to the road, a carriage or wagon cannot, of course, stand at his gate.

I have ventured upon these practical questions, which, perhaps, do not, strictly speaking, belong in the pages of a legal journal, because it seems to me that this whole system requires either fresh legislation or a new interpretation of the existing laws which certainly were never intended to apply to the conditions which I have described. It is surely unfair to require of a steam railroad that it shall pay for the route which it selects, and shall protect the public from injury at its hands, and yet to permit a scarcely less dangerous rival to have, without compensation of any sort, a right of way already constructed at the public expense, and for another purpose. Of course, as we have seen, the condition precedent to the occupation of the highway is the Supervisor's consent, and there have been instances in which these officers have required a strict compliance with proper police regulations, compelling the companies to widen roads at their own expense and imposing conditions as to speed and places for stopping. But these cases are rare, and the necessity for a radical change in the law itself is very apparent to every one who has considered the subject and observed its practical side. Whether or not a similar condition of affairs prevails in other states than Pennsylvania is a question that others of your readers must answer.

F. H.

Delaware County, Pennsylvania.

* Vol. 2 (N. S.), No. 1, p. 38.

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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR FEBRUARY.

Edited by ARDEMUS STEWART.

In the opinion of the Court of Civil Appeals of Texas, a recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, as a result of the same negligence; on the ground that, since the owner of property may recover in separate actions for injuries done to his person and property at the same time, and as a result of the same negligent act, (*Watson v. Ry. Co.*, (Tex.), 27 S. W. Rep. 924,) *a fortiori* a similar rule should obtain in the case of a contemporaneous injury to a wife; the issue in such a suit is within the scope of neither the pleadings nor the evidence in a suit by the husband for the injury to himself: *Texas & P. Ry. Co. v. Nelson*, 29 S. W. Rep. 78.

But the recovery of damages for the killing of one horse is, according to the same court, a bar to the recovery of damages for another, killed at the same time and place: *St. Louis & S. W. Ry. Co. v. Moss*, 28 S. W. Rep. 1038.

The Supreme Court of California, in *In re Philbrook*, 38 Pac. Rep. 884, has recently decided that an attorney, who, in his brief in the Supreme Court, without ground, characterizes an associate justice thereof as a corrupt person, and threatens that, if the Supreme Court decides adversely to his client, the general public will see that it is corrupt, should be suspended from practice.

The labor unions have at last got a taste of Jersey justice, the story of which is quite refreshing to read, after the weak attempt to conciliate those bodies that it was our misfortune to chronicle last month. Mr. Barr, the proprietor of a daily newspaper, printed in Newark, Essex Co., N. J., decided to use what is known as "plate matter" in the make-up of his paper, in spite of the sovereign displeasure of the union of which his employees were at that time members. Some of these left his employment; others were manly and honest enough to stay, and forfeited their membership in consequence. The union then withdrew its indorsement of the paper, and reported the matter to the trades council, a representative body, with which this and other trades unions were affiliated, representing in the aggregate a purchasing power of \$400,000 a week. After the publication by each side of its version of the dispute, the trades council issued a circular, calling on all its friends to boycott the paper, and to cease buying and advertising in it. The Court of Chancery, on these facts, very properly held, (1) That a boycott started under such circumstances, in pursuance of which not only the members of the various societies, by their rules, but the general public as well, by the circular, were called on to cease buying or advertising therein, and personal application was made to actual advertisers by the distribution of printed circulars and resolutions of the societies, suggesting that they discontinue their advertising therein, even if they had made contracts to so advertise, enforced by a threat, in the guise of a suggestion, that if they did continue to do so, they would also incur the enmity and

opposition of organized labor, followed by actual damage to the proprietor of the paper from loss in circulation and advertising, is an actionable wrong; and (2) An injunction will issue to restrain the defendants from doing acts which threaten a continuing injury and probable ruin of the complainant's business, the legal remedy for which is inadequate, and would involve a number of suits; for (3) Even when there is a legal remedy, equity will interfere by injunction to prevent (a) an injury which threatens irreparable damage, and (b) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits; (4) The criterion of the application of this jurisdiction is the inadequacy of the legal remedy, as determined by the following questions: (a) whether the injury done or threatened is of such a nature that, when once accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money; and (b) whether full compensation for the entire wrong can be obtained without resort to a number of suits. If either of these questions cannot be answered in the affirmative, an injunction should issue: *Barr v. Essex Trades Council*, 30 Atl. Rep. 881.

When a person boards a train to assist a friend thereon, intending to get off as soon as his friend is seated, but gives the company no notice of his intention, the company is not liable for injuries received by him in alighting after the train starts, when it stopped the usual time, and the plaintiff did not request

Carriers,
Persons assist-
ing Another
on Train

the employees to stop the train, before attempting to alight: *Texas & P. Ry. Co. v. McGibbary*, (Court of Civil Appeals of Texas,) 29 S. W. Rep. 67.

In general, a person who wishes to assist another on a train must give notice to the trainmen of his intention to alight after doing so, or they will not be guilty of negligence in starting the train before he has time to get off: *Coleman v. Ga. R. R. & Bkg. Co.*, (Ga.,) 10 S. E. Rep. 498; *Mo., K. & T. Ry. Co. v. Miller*, (Tex.,) 27 S. W. Rep. 905; *Yarnall v.*

Kansas City, Ft. Scott & Memphis R. R. Co., 113 Mo. 575; S. C., 21 S. W. Rep. 1. He cannot even ask that the train be held the usual time of a stop at that station, but only a reasonable time to allow him to get off: *Lawton v. Little Rock & Ft. Scott Ry. Co.*, (Ark.), 18 S. W. Rep. 543. But when a person has been in the habit of boarding a street car to assist a child to a seat, and then getting off, and the driver of the car knew of this habit, the jury may infer that the driver knew or should have known that this was her intention on the particular occasion, and it is error to direct a nonsuit: *Houston v. Gate City St. R. R. Co.*, 89 Ga. 272.

The Court of Civil Appeals of Texas has recently decided a very interesting point, in *United States v. Schwalby*, 29 S. W. Rep. 90, to the effect that when trespass to try title to land, occupied as a fort by the United States, is brought in a state court against the commanding officers as individuals, and the United States makes itself a party defendant, the state court has jurisdiction, as the cause is not a suit against the United States, nor an attempt to subject the property thereof to suit.

In *Moulton v. Dunn*, 61 N. W. Rep. 898, the Supreme Court of Minnesota has ruled, that when plaintiff agreed with defendant to locate him upon a valuable quarter section of pine land, which had been long withdrawn from the market for railroad purposes, and to do all that was necessary or could be done to enable defendant to acquire title thereto under the homestead or preemption laws of the United States; and, in pursuance of this agreement, attended several sessions of Congress, appeared before the Secretary of the Interior and the committees of the Senate and House of Representatives, and employed counsel to urge the passage of a bill, declaring said lands forfeited to the government, and providing that parties who had settled on the land in good faith should have the preference to enter the same under the homestead laws, when they should be put on the market; the defendant having

Conflict of
Laws,
Suits against
United States

Contract,
Public
Policy,
Lobbying

agreed to pay the plaintiff when the right to make final proof for the land was acquired;—that such a contract is void, as against public policy.

A contract for the collection of a claim from the government, which provides for compensation contingent on success, and in which the principal service contemplated and actually performed is procuring the necessary legislation, is void: *Spalding v. Ewing*, 149 Pa. 375. But the employment of an agent to draft a bill and fairly and openly explain it to a legislative committee, or to individual members of the legislature, and ask to have it introduced, is good, if the compensation is specified in the contract: *Chesbrough v. Conover*, 140 N. Y. 382; S. C., 35 N. E. Rep. 633. The question seems to turn largely on the nature of the compensation, and the inducement offered to use illegitimate means to secure success.

According to the Court of Criminal Appeals of Texas, when, on a trial for burglary, it is shown that the defendant proposed the crime to another, who then informed the owner of the premises sought to be burglarized; that the owner told the informer not to hinder the defendant, but to let him come of his own free will; that the informer agreed with the defendant to commit the burglary, without intending its accomplishment; and that there was an actual entry;—that, on this state of facts, the defendant did not have the consent of the owner, so as to nullify the criminal character of the act: *Robinson v. State*, 29 S. W. Rep. 40.

If a person is employed by another to assist a criminal in the perpetration of a crime, in order to secure the punishment of the latter, and the assistant merely aids the criminal to accomplish his own evil design, the crime is not lessened by the fact that its commission may have been made easier: *State v. Stickney*, (Kans.,) 36 Pac. Rep. 714; *Pitt v. Curtis*, 95 Mich. 212; S. C., 54 N. W. Rep. 767; *Pigg v. State*, 43 Tex. 108; *Conner v. State*, 24 Tex. App. 245; S. C., 6 S. W. Rep. 138; *State v. Jansen*, 22 Kans. 498. But if the decoy suggested the crime, or induced the offender to commit it, or lent him aid which would amount to consent if given by the

owner of the property affected, his act is the act of his employer, and the criminal element is lacking: *Spreden v. State*, 3 Tex. App. 156; *Pro. v. McCord*, 76 Mich. 200; *Pro. v. Pinkerton*, 79 Mich. 110. Mere consent to the completed crime, however, cannot lessen the criminal character of a conspiracy to commit it: *Jakson v. State*, 3 Tex. App. 590.

In *State v. Sommers*, 61 N. W. Rep. 907, the Supreme Court of Minnesota has recapitulated some elementary principles of criminal law, as follows: (1) The accused, in a criminal case, is put in jeopardy of punishment, in the legal and constitutional sense, when a jury is impaneled and sworn to try his case upon a valid indictment; (2) That after the jury is thus charged with the prisoner, he is entitled to have the trial proceed to a verdict, unless some intervening necessity should prevent; (3) That though such a necessity arises when the jury are unable to agree, yet, in a prosecution for a felony, the defendant has a right to be present at all proceedings, unless he has waived it; and therefore, (4) If, in such a case, the jury is discharged without the consent of the defendant, and during his enforced absence, (in prison,) he cannot again be tried for the same offence.

Similarly, though the defendant in a prosecution for a misdemeanor may waive a full jury, yet, if that is waived for him by his counsel in his absence, without his knowledge, and he does not notice it till the jury is being polled, he is entitled to a new trial: *U. S. v. Shaw*, 59 Fed. Rep. 110.

The Supreme Court of Indiana, in *Hutchins v. State*, 39 N. E. Rep. 243, has held, that it is improper for the foreman of a jury, while they are considering their verdict, to make and enforce a rule that no juror can express an opinion, unless he first arises and addresses the foreman as chairman, and is recognized by the latter.

The Supreme Court of Georgia, in *Atlanta & W. P. R. Co. v. Smith*, 20 S. E. Rep. 763, has laid down the rule, that when, in an action for damages for personal injuries, the mortuary table and the annuity table are both before the jury, any instruction given by the court

as to their use in ascertaining present value should not leave it uncertain as to which table is to be consulted for that purpose, but should make it clear that the annuity table alone is applicable ; and when that table contains different columns, giving present values at different rates of percentage, that fact should be clearly brought to the notice of the jury.

The Court of Appeals of New York has decided, that when the name of an office, and of the candidates nominated there-
Elections, Ballots, Qualifications of Candidates for, are omitted from the official ballot of an election, at which the office omitted is by statute required to be voted for, by the negligence of the officer whose duty it is to prepare the ballots, a voter may write on the ballot both the name of the office and the name of the candidate for whom he votes, and the vote will be valid, under an act which provides that the voter may write the name of any person for whom he wishes to vote for any office on the official ballot which he proposes to vote: *Pro. v. President, &c., of Village of Wappinger's Falls*, 39 N. E. Rep. 641; affirming 31 N. Y. Suppl. 758.

If one is to believe the current trend of decision, the intention of the voter is the very last thing to be considered in determining the validity of a vote under the
Marking Australian Ballot system; although ordinary men were foolish enough to adopt that system under a belief that it was especially adapted to effectuate that intention. The Supreme Court of Michigan is the latest example of this peculiar obliquity of mental vision, though it must be acknowledged that it sees straighter in this direction than most of the other courts. The Ballot Law of that state, (Laws Mich. 1891, No. 190,) provides that an elector may mark a stamp or cross in the space below the party name printed at the head of the ballot; that if thus marked the ballot shall be counted for all the candidates of the party whose names appear in that column; that if the voter erases some name in the column, or marks a cross before the name of a candidate for the same office in some other column, or writes in a name under the name of any candidate, the name

of the candidate thus treated shall not be counted as voted for, but if the name of the candidate is erased, the vote shall be counted for the candidate whose name is marked in another column, or is written in under the name erased; that any ballot which bears any distinguishing mark or mutilation shall be void, and shall not be counted; and that if it is impossible to determine the elector's choice, from any ballot or part of a ballot, it shall be void as to the candidates thereby affected. But the very precaution thus taken to secure the counting of the vote has proved its own ruin; for the court evidently proceeded, in *Ellis v. Glaser*, 61 N. W. Rep. 648, to interpret it with reference to the maxim of *expressio unius*, and held: (1) That any mark on a ballot, other than the one appropriate and necessary under the law to designate the intention of the voter, must be regarded as a distinguishing mark; and that therefore, (2) Ballots which have under the heading more than one cross; (3) A ballot which has a cross in the square under the heading of one ticket, and two marks like commas in the square under the heading of another ticket; (4) A ballot which has a cross under the heading of one ticket, with a half circle around it, and a figure written in the square under the heading of another ticket; (5) A ballot which has a cross under the heading of one ticket, with a mark under the name of a certain candidate on such ticket, and a cross opposite the name of the opposing candidate on another ticket; (6) A ballot which has a blot in the centre of the ticket, and no cross upon it; (7) A ballot which has a straight line under the heading of one ticket, and no cross upon it; and (8) A ballot which has a cross under the heading of one ticket outside the square, and the square inclosed in a large circle; should not be counted. This decision is beyond doubt correct as to (3), (4), (6) and (8); in (3), (4) and (8), on the ground of a distinguishing mark, and in (6), on the ground of uncertainty, the ballot not being marked at all. But in (2) and (7) the intent is clear, and the mark hardly of sufficient prominence to be called distinguishing, and in (5), the ordinary presumption would be that the voter intended to erase the name marked. With surprising liberality, however, the court admitted as

valid, (1) A ballot with a cross in the square under the heading of one ticket, the name of one candidate erased, and only the surname of the candidate on the opposing ticket written in; (2) A ballot with a cross in the square under the head of one ticket, the name of one of the candidates partially erased, and the name of another person written in with a lead pencil; and (3) A ballot with a cross in the square at the head of one ticket, the name of one candidate thereon erased, and the name of his opposing candidate written in. It also very properly held, that when the attorney general, in a letter of instruction to election officers and electors, stated that when ballots were used on which two tickets appeared, with a candidate for a place on each ticket, and a cross was placed in an appropriate place on each ticket, the ballot should be counted for such candidate, and that the fact that the voter indicates in more than one way his desire to vote for any candidate on the ballot is no reason why he should be deprived of his vote, or the candidate deprived of its credit; and has also given the opinion that a certain ballot, on which the voter placed a cross opposite the names of the individual candidates on one ticket, and erased the names of the candidates on opposing tickets, was a good vote for the candidates opposite whose names the cross was placed:—that, in view of this construction of the act by the executive department, ballots of the class referred to, cast in an election two years later, could not be declared illegal, and should be counted. For a brief resumé of the decisions on the question of marking ballots, see 1 *AM. L. REG. & REV. (N. S.)* 748; 2 *AM. L. REG. & REV. (N. S.)* 83.

The Supreme Court of Pennsylvania, in *McCovin's Appeal*, 30 *Atl. Rep.* 955; has held, that under an act providing that

at the right of the list of candidates for an office
there shall be left as many blank places as there
are candidates to be voted for for that office, and that the voter may insert, in the blank space prepared therefor, any name not already on the ballot, ballots marked by pasting a blanket slip over the right hand column of the ballot, on which is printed the title of the office to be filled, and the name of the candidates voted for, and the printed directions thereon

as to the manner of marking the ballot, are illegal, and cannot be counted; but names may be inserted by single sticker, or by stamp, or in any other appropriate way.

The selection of the president of the city council by that body is an election, within a statute prohibiting the offer of a

Bribery bribe to influence one's vote at an election: *Commonwealth v. Root*, (Court of Appeals of Kentucky,) 29 S. W. Rep. 351; but the offer of money to a councilman

to induce him to cast his vote for a certain person to fill an office which does not exist, is not bribery, according to the same court: *Commonwealth v. Reese*, 29 S. W. Rep. 352.

It is a question of fact for the jury, whether a company operating an electric railroad is negligent in not maintaining a guard wire over its trolley wire, so as to prevent a fallen telephone wire from resting on its trolley wire, and becoming charged with the trolley current, to the injury of one driving along the street: *Black v. Milwaukee St. Ry. Co.*, (Supreme Court of Wisconsin,) 61 N. W. Rep. 1101.

The Supreme Court of Tennessee, in *Cumberland Telegraph & Telephone Co. v. United Electric Ry. Co.*, 29 S. W. Rep. 104, holds, that when a telephone company, already in operation, is injured by the effects of the more powerful electric current used by a trolley company operating on the street on which the wires of the telephone company are placed, through the trolley current invading the telephone exchange and the houses of subscribers, the trolley company is liable for the damage done to the business of the telephone company; and none the less so, because the latter did not obviate the effects of conduction, by making the necessary changes in its plant. Being first on the ground, it was not bound to do so.

This commends itself to the justice, as well as the judgment of mankind, far better than the contrary position taken by the Ohio courts in *Cincinnati Inclined Plane Ry. Co. v. City & Suburban Telegraph Assn.*, 48 Ohio St. 390; S. C., 27 N. E. Rep. 890; or the refusal of the Supreme Court of New York to

enjoin the erection of an electric road: *Hudson River Tel. Co. v. Watervliet Turnpike Co.*, 32 N. E. Rep. 148; which was followed in *Natl. Tel. Co. v. Baker*, [1893] 2 Ch. 186.

In the opinion of the Supreme Judicial Court of Massachusetts, a pamphlet issued in great numbers by an association, stating that a certain fund is held in trust by the association for certain purposes, is admissible against the chief officer of the association, to prove that he knew that the fund was a trust fund: *Putnam v. Gunning*, 39 N. E. Rep. 347.

Communications by a client to his attorney of an intent to commit an illegal act, such as an intent to violate the insolvent law by permitting certain creditors to obtain preferences, are not entitled to protection as confidential: *Taylor v. Evans*, (Court of Civil Appeals of Texas,) 29 S. W. Rep. 172.

Communications to an attorney, concerning a proposed infraction of the law, are not privileged: *Hickman v. Green*, (Mo.,) 22 S. W. Rep. 455; nor will communications be protected, which are made while seeking to obtain professional advice in an attempt to cheat or defraud creditors; and an attorney who advised about and drew up a fraudulent bill of sale can be compelled to testify as to what was said to him by his client: *Hamil v. England*, 50 Mo. App. 338.

The Supreme Court of Tennessee is of opinion: (1) That upon the cross-examination of a locomotive engineer, who testifies as an expert on the question of running trains, it is allowable to use a standard authority on the subject in shaping the questions put to him, and to require him to examine the book, and read from it, with a view of testing his knowledge on the subject; and (2) That if counsel is permitted, without objection from the other side, to read to the jury extracts from a standard authority on a subject involved in the suit, as evidence of the facts therein stated, it is not a reversible error: *Byers v. Nashville, C. & St. L. Ry. Co.*, 29 S. W. Rep. 128.

Though the general question is still involved in some

Evidence,
Pamphlets

Privileged
Communications,
Illegal Intent

Evidence;
Works of
Science

doubt, scientific works are admissible in evidence, under the statutes of several states; but even then they must be shown to have a direct bearing on the case; and, in an action against a railroad company for killing a person on the track, an extract from a work known as the American Mechanical Dictionary, treating of appliances for stopping trains and the distances required therefor, which did not give the size of the train, the pressure applied to the brakes, nor the character of the grade, was held not admissible: *Burg v. Chic., R. I. & P. Ry. Co.*, (Iowa,) 57 N. W. Rep. 680.

The Court of Civil Appeals of Texas, in *Laing v. State*, 28 S. W. Rep. 1040, holds, that when an adult, who employed Intoxicating
Liquor,
Sale to Minor
for Adult a minor, sends him to a saloon to buy beer for him, and the minor so informs the saloon keeper, the sale is to the employer, not to the minor.

When a minor bears a written order for liquor from an adult, the sale is made to the adult, not to the minor; but if the order is verbal only, or if the principal be not disclosed, the sale is to the minor: *State v. McLain*, 49 Mo. App. 398; and this is so, even when the minor has been in the habit of bringing *bona fide* orders, and delivering the liquor; if he but once drinks it himself, the sale is to him: *Dixon v. State*, 89 Ga. 785; S. C., 15 S. E. Rep. 684. It has even been held, in Texas, that a sale on a verbal order was to the minor, though he actually delivered the liquor to his principal: *Yakel v. State*, 30 Tex. App. 391; S. C., 17 S. W. Rep. 943. This ruling is hardly worth discussing. It is conclusively refuted by HUNT, J., in his dissenting opinion: 20 S. W. Rep. 205; and would seem to be overruled by the case above. The Arkansas courts have held, very properly, that if the minor is known to be doing the errand of another, the sale is not to the minor: *Wallace v. State*, 16 S. W. Rep. 571.

The Supreme Court of Nebraska has recently decided, that a written accusation against a clergyman, preferred by the Libel,
Clergyman deacons in the church, according to the usages of the church, charging him "with repeatedly and persistently uttering statements that are contrary to the truth,"

and going on to state, that "we charge him with giving way to violent and unchristian temper. We charge him with defaming the good name of members of the church;" is libelous *per se*; but a plea that the accusation was preferred according to the usage and discipline of the church, is a good plea of qualified privilege: *Piper v. Workman*, 61 N. W. Rep. 588.

The act of the trustees of a school in collecting evidence in respect to the conduct of the principal, and sending it to the board of education, which alone had power to remove her, is privileged, as being within the line of their public duty; and sending a copy of such charges to the principal, in order that she might answer the charges against her, is not a publication: *Galligan v. Kelly*, (Supreme Court of New York,) 31 N. Y. Suppl. 561.

These are but extensions of the rule that makes accusations in the course of judicial proceedings privileged, if made to the proper tribunal, though otherwise libelous: *Pidley v. Morris*, 61 L. J. Q. B. 21; *Tilley v. Roney*, 61 L. J. Q. B. 727. All charges made before a proper church tribunal, are privileged, whether made as the foundation for action, or during the course of the proceedings: *Shurtleff v. Stevens*, 51 Vt. 501; *Etchison v. Pergerson*, 88 Ga. 620; S. C., 15 S. E. Rep. 680. But slanderous words, spoken to a former pastor of the church, are not privileged: *Carpenter v. Willey*, (Vt.,) 26 Atl. Rep. 488.

The Supreme Court of Pennsylvania has lately held, that several distinct conversations in regard to a debt barred by the statute of limitations cannot be considered together, in order to determine the sufficiency of promises made in them to remove the bar: *Patterson v. Neuer*, 30 Atl. Rep. 748.

According to the Circuit Court for the Eastern District of Pennsylvania, a scheme for issuing bonds to investors, upon monthly instalments, and payable out of the redemption and reserve fund, of such a nature that, with no special advantage, an investor could not get back even

all that he put in, but offering a chance, by the anticipated redemption of some of the bonds, to obtain an exorbitant premium at the expense of other investors, is a gambling scheme, pure and simple; and that a bondholder, if he has paid money into the treasury of the corporation issuing the bonds, is entitled to have a receiver of its assets appointed, to prevent frauds and preserve the subject of litigation, pending the determination of the rights of all the bondholders: *McLaughlin v. Natl. Mut. Bond & Investment Co.*, 64 Fed. Rep. 908.

The Court of Appeals of England has recently decided, in *Alabaster v. Harness*, [1895] 1 Q. B. 339, that (1) In order to justify maintenance by one person of the suit of another, there must either be a common interest recognized by the law in a matter at issue in the suit, or the case must fall within one of the specific exceptions from the law against maintenance established by the authorities; (2) That when the defendant, being interested in the sale of certain electrical appliances for the treatment of disease, employed one T. as an expert to report thereon, who reported favorably; the plaintiffs, proprietors of a newspaper, subsequently published an article commenting adversely on T.'s report, and the appliances in question, and casting reflections on T.'s qualifications as an expert, and on his conduct and that of the defendant in connection with the report and the sale of those appliances, whereupon T. brought an action for libel against the plaintiffs, at the instigation of the defendant, who furnished the money for the purposes of the action; and the action resulting in a verdict and judgment for the defendant therein, the present plaintiffs, they then sued the defendant for maintenance, claiming as damages the costs incurred in defending the action for libel, which T. was unable to pay;—that the action could be maintained, on the ground that the defendant had no common interest with T. in the action for libel, and therefore was not entitled to maintain him in bringing and prosecuting that action.

The Supreme Court of Iowa has lately held, in *Eighty v.*

Union Pac. Ry. Co., 61 N. W. Rep. 1056, that a railway company, which voluntarily furnishes a hospital for the treatment of its employes in case of injury, is not liable for the malpractice of the surgeons employed, if they are competent.

Whether required by statute, or assuming the duty, the master who employs a physician to attend his employes, the carrier who employs one to attend its passengers, or the hospital or other institution that employs one to attend its inmates, is only bound to procure one who is competent, and when that duty has been performed, he is free from all liability for the physician's negligence: *Union Pac. Ry. Co. v. Artist*, 60 Fed. Rep. 365; *So. Fla. R. R. Co. v. Price*, 32 Fla. 46; S. C., 13 So. Rep. 638; *O'Brien v. Cunard S. S. Co., Ltd.*, (Mass.) 28 N. E. Rep. 266; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; *Laubheiser v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 228; S. C., 13 N. E. Rep. 781; *Allen v. State S. S. Co.*, (N. Y.) 30 N. E. Rep. 482, reversing 8 N. Y. Suppl. 803. But if the physician is incompetent, or unfit to perform his duties, the employer is liable; though, if he has used ordinary care, he is not responsible, even when the hospital is supported by the forced contributions of the employes: *Richardson v. Carbon Hill Coal Co.*, (Wash.,) 39 Pac. Rep. 95.

The Supreme Court of Minnesota, in *Emery v. Hertig*, 61 N. W. Rep. 830, has decided, that a person employed by a contractor to polish granite columns designed for and used in the construction of a building for a bank, is entitled to a mechanic's lien therefor, although, when he performed the work, he did not know for what particular building the columns were intended. It was enough, if it was understood, (as the court held it must have been from the nature of the columns,) that they were intended for building purposes, and not for the general market.

The Supreme Court of the United States has just decided,

in *Bate Refrigerating Co. v. Scharzchild & Sulzberger*, (not yet reported,) one of the most important questions of patent law that has been raised since the Bell Telephone cases. The question in dispute arose under § 4887 of the Revised Statutes of the United States, which provides as follows: "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been *first patented or caused to be patented in a foreign country*, unless the same has been introduced into public use in the United States more than two years prior to the application. But every patent granted for an invention which has been *previously patented in a foreign country* shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one at the same time, with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The plaintiff contended that an invention patented or caused to be patented in a foreign country before being patented in the United States, should not be deemed to have been "previously patented in a foreign country," within the meaning of the section of the Revised Statutes quoted above, unless the foreign patent was granted *prior* to the *application* for the American patent; while the defendants claimed that the dates of the American and foreign *patents*, and not the date of the American *application*, determined the question whether an invention, patented in the United States, had been "previously patented in a foreign country." The question was therefore squarely presented, whether the foreign patenting of an invention subsequently patented in the United States, must antedate the patenting or the application here, in order to fall within the terms of the statute.

The court, in a very able and exhaustive opinion by Mr. Justice HARLAN, accepted the contention of the defendants, and held, that the words "prior to the application" could not be superadded in the section of the Revised Statutes in question, either after the words "first patented or caused to be patented in a foreign country," or after the words "previously patented in a foreign country," without defeating the intention of Con-

gress, as manifested by the language it selected to indicate its purpose; that the express command of the statute was, that every American patent for an invention "previously patented in a foreign country," that is, "first patented or caused to be patented in a foreign country," shall expire at the same time with the foreign patent; and that therefore, when an article is patented in a foreign country before the American patent for it is issued, the latter expires with the former, though the application therefor was made prior to the granting of the foreign patent.

Incidentally, the court decided several collateral matters of much importance: (1) That to curtail the full term of a patent, by reason of the issuance of a foreign patent for the same article subsequent to the application therefor in the United States, is no breach of the promise of the United States, made at the date of the application, to give the inventor a patent for the full term of seventeen years, if, upon examination, it should be found that he was entitled to one at the date of the application; for the curtailment of the term for the reason mentioned is an express condition of the grant; (2) That it is the duty of the Supreme Court to follow, as far as is consistent with reason and justice, prior decisions of the lower courts on the same question as that before it, and rulings of the officers of the executive branch of the government in reference to the same subject matter; and (3) That the observations of a member of a committee of a legislative body, made when reporting a bill from committee, are not to be taken as an indication of the construction of the bill by that body, especially when the bill receives various amendments during its passage, making material alterations from the document reported by the committee; nor can it be assumed, in any case, that a legislative body bases its action upon the opinions of individual members of that body as to the scope and legal effect of a statute.

The effect of this decision will be to put a stop at last to a practice of which inventors have too often been guilty, and which is briefly referred to in the opinion in this case,—that of purposely delaying action by the Patent Office upon applica-

tions for patents, until they could reap the full benefit of the monopoly they had obtained in foreign countries before taking out an American patent. This practice is very tersely summarized in the report of the Commissioner of Patents for 1887, quoted by Mr. Justice Harlan: "In the meantime, they are engaged in manufacturing and putting upon the market the article or improvement, but warning the public that the patent is applied for, the effect of which is to give them the absolute control and monopoly of the invention, and to deter all other inventors from entering upon the same field of invention, and from manufacturing the article." The very existence of such a practice should have inclined the court, even if the statute were ambiguous, to adopt a construction which would put an end to it.

The rule that makes the proceedings of ecclesiastical tribunals conclusive as to matters within their jurisdiction, does not apply when civil rights are involved; and in such cases the courts are not bound by them.

*Religious
Societies,
Rea Judicata*

Thus, according to a recent decision of the Supreme Court of Nebraska, when the deacons of a church have made a written accusation against a clergyman, preferred in the church, which is otherwise libelous *per se*, the finding and judgment made by the church in the trial of the clergyman on the charges is not competent evidence for either party in a suit for damages for the libel, and is properly stricken out of the answer of the deacons: *Piper v. Woolman*, 61 N. W. Rep. 588.

The Supreme Court of California has recently decided, BEATTY, C. J., and DE HAVEN, J., dissenting, that if there is any variance between an act of Congress, as found in the printed volume of statutes, and the original, as enrolled and deposited with the Secretary of State, the latter will prevail: *McLaughlin v. Menotti*, 38 Pac. Rep. 973. This is especially true, when, as in this case, the enrolled bill gives a much better meaning to the act.

*Statutes,
Enrolled and
Printed Copies*

The Supreme Court of Washington has lately held, that under a statute making it unlawful "to open on Sunday for the purpose of trade or sale of goods, wares and merchandise, any shop, store or building, or place of business whatever," a barber cannot be convicted for opening his shop and plying his trade on Sunday; the act applies only to stores, shops, &c., used for the purpose of trade in or sale of goods, and not to places where, as in the case of a barber shop, a mere trade or profession is exercised, but no goods are traded or sold: *State v. Kreck*, 38 Pac. Rep. 1001. Suppose the barber sells a bottle of hair restorer on Sunday, what then? His trade is "work," however, within the meaning of that word in the "Sunday" laws: *State v. Wellott*, 54 Mo. App. 310; and is not a "work of necessity:" *Comm. v. Waldman*, 140 Pa. 89; S. C., 21 Atl. Rep. 248, affirming 8 Pa. C. C. 449; *Comm. v. Jacobus*, 1 Camp. (Pa.) 491; *Ohio v. Schuley*, 23 Wkly. Law Bull. 450; though that has been held a question for the jury: *Ungericht v. State*, 119 Ind. 379; S. C., 21 N. E. Rep. 1082. See 15 Cent. L. J. 145.

The Court of Civil Appeals of Texas is of opinion, that when it is the custom of the employees of a telegraph company, known and allowed by the company, to receive for transmission messages by telephone, the company is bound to send a message so received, and agreed by its employees to be sent: *Texas Telegraph & Telephone Co. v. Seiders*, 29 S. W. Rep. 258.

A manufacturer is entitled to call his goods by a name which is merely a substantially correct description of them although, by reason of another manufacturer having for many years sold similar goods under the same name, purchasers may be thereby misled into the belief that they are buying the goods of that other manufacturer: *Reddaway v. Banham*, (Court of Appeal,) [1895] 1 Q. B. 286.

The Supreme Court of Tennessee has ruled, that when a

testator, after giving his nephew all his land, and the proceeds

with, in case it was sold, and providing for the payment
Construction. of his debts, gave him all the money arising from
"Property" the sale of his stock, of every kind, and all his
"loose property," which he directs to be sold, these latter
words are not to be restricted to property *ejusdem generis* with
the stock mentioned in the preceding clause, but include all of
the testator's personalty, including money on deposit and
choses in action: *Fry v. Shipley*, 29 S. W. Rep. 6.

EXEMPTION OF CHURCHES AND CHARITABLE INSTITUTIONS FROM ASSESSMENTS FOR STREET PAVING, ETC.

The Supreme Court of Pennsylvania in the case of the *Appeal of the M. E. Church of Scrivickley*, 35 W. N. C. 554, decided in January, 1895, has overruled its own most recent decisions on the subject, and has gone entirely contrary to the popular and professional understanding. The appellant had been assessed for the paving of a street in front of its church building, the paving having been ordered by the borough authorities in response to a petition in which the appellant had joined. The court below, on what grounds the report of the case does not state, upheld the assessment. The Supreme Court affirms the judgment upon two grounds; first, that having joined in the petition for the paving, the church was bound in equity and good conscience to pay its share of the cost; and second, that "taxation," from which churches were exempted by the Act of May 14, 1874, did not include within its meaning special charges of this character, but included only general burdens, borne by the people at large. The opinion is delivered by Chief Justice STERRETT, and there is not a dissenting voice, although the concluding paragraph expressly overrules all former decisions inconsistent with the present ruling. Perhaps, however, the most important feature of the opinion is the strong intimation, that even had the Act of 1874 included such charges in express terms, it would have made no difference, as such a provision would exceed the constitutional power of the legislature, as the authority to exempt from taxation was derived from the constitution, and, as before stated, the word "taxation" did not include local assessments for municipal improvements. Chief Justice STERRETT cites two cases in the earlier Pennsylvania reports: *Northern Liberties v. St. John's Church*, 13 Pa. 104, and *Pray v. Northern Liberties*, 31 Id. 69. But he relies on *Illinois Central R. R. v. Decatur*, 147 U. S. 190, 197. He recognizes

the fact that local assessments are "referable to the taxing power," but says that the distinction drawn between them and general taxes in questions of exemption is well recognized, and supported by "an almost unbroken line of authorities in nearly all of our Eastern States." The effect of this decision is very serious; and it is proposed herein to consider the subject as fully as space will permit; necessarily it will have to be considered somewhat from a Pennsylvania standpoint. But the question, and the public policy involved in it, are much the same everywhere. First, then, as to the law of Pennsylvania, as it stood prior to this decision. The case of *Pray v. Northern Liberties*, though reported later, was decided prior to *Northern Liberties* against *St. John's Church*, in which it is mentioned. It was not a question of the exemption of charitable institutions from taxation at all, but was an effort on the part of an individual to escape payment of municipal assessment on the ground that the amount due had not been registered in the office of the county commissioners, in obedience to the Act of 1824, requiring all *unpaid taxes* to be so registered. The court simply decided squarely that such an assessment *was not a tax*. And when the question came up in *Northern Liberties v. St. John's Church*, *supra*, Judge COULTER, who had delivered the opinion in the former case, referred to the fact that it had already been decided that such assessments were *not taxes*, and added that it was evident on the face of all the Acts relating to them in incorporated districts, that the legislature had the distinction in mind. In *Prunock v. Hoover*, 5 Rawle, 291, decided fifteen years earlier, it had been distinctly held that such assessments *were* taxes, under the very Act of 1824, above referred to, and as such were a lien prior to those of mechanics. In *Borough of Greensburg v. Young*, 53 Pa. 280, such assessments were stated by Judge THOMPSON, not to be taxes, citing the two *Northern Liberties* cases, but the point before him was as to whether if their collection would exceed the amount the borough was permitted to raise by taxation in any one year, they could not be imposed. The decision was no doubt entirely correct—such could hardly have been the intention of the legislature.

Subsequent cases, among which may be mentioned, *Washington Ave.*, 69 Pa. 352, and *Centre St.*, 115 Pa. 253, say that such assessments can only be sustained under the power to tax. Judge AGNEW, in *Washington Avenue*, just cited, remarked that if *Pray v. The Northern Liberties* and the other two cases, had meant that such assessments were not taxation at all, it would in effect deny the power of the legislature to authorize the assessments. Equally emphatic is the language of the late Judge SHARSWOOD in *Hammitt v. City of Philadelphia*, 65 Pa. 146. But the very question was squarely decided in *Olive Cemetery Co. v. Philadelphia*, 93 Pa. 129; *Eric v. Church*, 105 Pa. 280, and *Philadelphia v. Church*, 134 Pa. 207, in all of which the respective institutions were held to be exempt.

In *Olive Cemetery v. Phila.*, the court remarks: "If it were at all necessary, it would be an easy task to show the wisdom and propriety of exempting such property as that of the defendant in error from local taxation, but nothing of that kind is required. It is sufficient to know that the legislature, in creating the corporation, exempted its property from such taxation." Counsel in this case had called the attention of the court to some of the cases in New York, wherein a different rule had been laid down. This case was decided in 1880. Four years later came the case of *Eric v. the Church*. Here, again, many cases in other states were cited by counsel, and the court was asked to depart from *Olive Cemetery v. Phila.*, and bring its rulings into agreement with those in other states. But this the court declined to do, saying, that the last mentioned case had definitely settled that such an assessment was a tax, and that, therefore, the church was exempt. In 1890, the case of *Phila. v. the Church* was decided, and in a short per curiam opinion the exemption from such taxation was affirmed. In *Phila. v. Penna. Hospital*, 143 Pa. 167, it was held that the obligation to curb and pave footways was a police regulation, while the other assessments were taxes, and, therefore, the one could be enforced and the other could not. This case was simply an affirmation of *Wilkinsburg v. Home for Aged Women*, 131 Pa. 109, decided in 1889.

The late Chief Justice, who delivered the opinion of the court in that case, said in concluding: "We regret for the sake of this deserving charity that we are unable to reach a different conclusion. The law is too plain, however, to admit of even a doubt."

Prior to the adoption of the present constitution of 1874, it had been definitely decided that such assessments were a tax. That constitution (Art. ix) provides that "the general assembly may, by general laws, exempt from taxation public property and for public purposes, actual places of religious worship," etc., etc. It does not specify the kind of taxes from which such institutions may be freed, but simply that that the legislature may exempt them from "taxation." By Act of May 14, 1874, such institutions are exempted "from all and every county, city, borough, bounty, road, school and poor tax."

To the average mind, it would seem difficult to imagine a more positive and comprehensive enactment. And, fortified as it has been by the language of the Supreme Court in the cases already cited, counsel who advised a client that an assessment of this kind was not a tax, or was not included in the meaning of the words of the constitution and Act of 1874, would have been bold, indeed. More especially is this true, as the trend of decisions has been to widen the scope of this Act in other ways, and bring within its terms institutions, which certainly could have been excluded without doing violence to its words, and to hold certain "revenue and income" admittedly received by certain institutions as not within the meaning of those words in the Act. So that we are brought face to face with a practical repeal of a portion of the statute, or the reading into it of an exception not only not found in it expressly or impliedly, but which had been distinctly declared not to exist. The decision cannot but be regarded as an abrupt and startling departure from the declared and well-settled policy of the Commonwealth; and it is to be presumed that the court felt moved to this by grave considerations of expediency; they say that they consider their present ruling sound in principle, and what they seem now to consider important, consonant with

the rulings of other states. Now, let us examine some of the rulings elsewhere, beginning with *R. R. Co. v. Decatur*, 147 U. S. 190, 197, relied on by the court. The statute under consideration in that case was the Act of February 10, 1851, of the Illinois legislature, incorporating the Railroad Company. By its 2d section, it declares: "The land selected [by the company] . . . shall be exempt from all taxation under the laws of this state. . . . After the expiration of six years . . . an annual tax for state purposes shall be assessed by the auditor upon all the property . . . belonging to said corporation. Whenever the taxes levied shall exceed . . . such excess shall be deducted . . . and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for," etc., etc. The company was assessed for street paving in front of some of its land. Mr. Justice BREWER, in a long opinion, defends the distinction between general taxation and local assessments as sound in principle.

Space forbids an argument upon this point here. But in the course of his opinion, he says: "But it is said that it is within the competency of the legislature, having full control over the matter of general taxation and special assessments, to exempt any particular property from the burden of both, and that it is not the province of the courts, when such entire exemption has been made, to attempt to limit or qualify it upon their own ideas of natural practice." After citing numerous authorities, among them *Olive Cemetery Co. v. Philadelphia* and *Eric v. Church*, *supra*, he says: "This is undoubtedly true," and then turns to the statute in hand, to apply the test. And as it certainly would seem evident from that act that it contemplated only general taxation, the decision cannot be complained of. There was no question of a charity involved. The whole question of policy and the surrounding circumstances were entirely different. The case was an affirmation of the judgment of the Supreme Court of Illinois, and the Supreme Court of that State had held in several cases of which *City of Chicago v. Larned*, 34 Ill. 203, is an example, that such assessments were not taxes, but were an exercise of the power of eminent domain, an additional reason

for construing the Act in question as not referring to them.

In the case of *Harvard College v. Boston*, 104 Mass. 470, where the words used in the college charter were "all civil impositions, taxes and rates," the words were held to include such assessments. In the course of its opinion, the court says, "it (the assessment) is in its legal character a tax, for it is levied, and can only be levied under the power of taxation confided by the constitution to the legislature." And after citing a case in Rhode Island as an example of cases, to be found elsewhere, they remark that the principle therein enunciated that such assessments "are both in the theory of the law and, in fact, but a return of a portion of the benefit specially conferred by the improvement," and that "provisions for exemption from taxes or impositions, whether existing in general statute laws or in special charters, are not to be deemed to include assessments for the improvement primarily of certain special localities, and derived from and carved out of the benefit conferred upon these special localities by these improvements" *does not meet with their concurrence*.

In *Boston Seamen's Friend v. Mayor and Aldermen*, 116 Mass. 181, it was held that such assessments were not within the meaning of the exemption in the General Statute Tax Act of Massachusetts (Ch. 115, § 5, Ch. 37).

That Act provides a general tax law of the state, and section five simply says: "The following property and polls shall be exempt from taxation," and then follows an enumeration. In *Mt. Auburn Cemetery v. The Mayor and Aldermen*, 150 Mass. 12, the charter of the cemetery provided that its land should be exempted from "all public taxes." It was held that such assessments could not be collected—that it was not the intention of the legislature that they should be—and that the decision, in 116 Mass., *supra*, was under a general law, and there was an implied limitation of the restriction to taxes, which were the subject of the chapter.

In *Brightman v. Kirner*, 22 Wis. 54, the words in the Act of 1854 were, "which amount of tax shall take the place and be in full of all taxes of every name and kind

upon said roads, or other properties belonging to said companies, or the stock held by individuals therein, and it shall not be lawful to levy or assess thereupon any other or further assessment or tax for any purpose whatever." In spite of the fact that the city of Milwaukee, by its charter granted in 1852, had the power given it in express terms, to assess real estate exempted from taxation under the law of the state, it was held that the legislature had power to pass the Act of 1854, and that its meaning was clear, and the assessments could not be levied.

In *The People v. Trustees of School*, 118 Ill. 52, following *Chicago v. The People*, held school property exempt from assessments, as well as general taxation, even though there was no statute exempting it, on the ground that the Act of Congress enabling the people of Illinois to form a State Constitution, provided that "the section, numbered 16, in every township . . . shall be granted to the state for the use of the inhabitants of such township, for the use of schools," and Art. 8, § 2, Const. Ill., 1870, provides that "all lands, moneys or other property donated, granted, or received for school, college, seminary or university purposes, and the proceeds thereof shall be faithfully applied to the objects for which such gifts or grants were made." At first blush, it is not easy to see just why, under these provisions, schools are exempt at all; but the court says that the reason is "the use for which the property was granted," and that the above provision of the constitution prohibited the legislature from directly appropriating this property to state or municipal purposes, and it could not do so by the indirect means of taxation. Counsel had made the usual argument that assessments took nothing from the property, and the assessment is only the extent of the benefit conferred upon it by the improvement. The court replies: "This may be so in theory, but not in certainty," and "it should not be exposed to the danger of being improved away, by being made to pay for *supposed benefits* conferred upon it by improvements." Why in the name of reason this answer could not be made in other cases, it is difficult to see, and yet this same court, in

County of Adams v. Quincy, 130 Ill. 566, 574, quotes with approval an opinion sustaining an assessment against a cemetery company in the face of a statute exempting it from "any tax or public imposition whatever!"

In *R. R. v. St. Paul*, 21 Minn. 526, it was held that "all taxation and assessment whatever," including municipal assessments. See, also, *St. Paul v. R. R.*, 23 Minn. 469. So as to "all public taxes and assessments:" *State v. City of St. Paul*, 36 Minn. 529. This was the case of a cemetery, and the court remarks that the object is not only to aid the cemetery in dollars and cents, "but mainly to preserve cemeteries for the particular use to which they have been appropriated, and then in accordance with the common sentiments of mankind, guard against the disturbance of the resting place of the dead, which would naturally ensue if the ground was liable to be sold to enforce the collection of taxes or assessments." See *Colston v. Cemetery Co.* (Ky.), 15 S. W. Rep. 245. There are undoubtedly a number of cases like that in Illinois in which the plain and obvious meaning of an enactment has been construed away. But many of them, as shown above, even those which hold the word "taxation" in a general statute, not to include municipal assessments, have given weight to the meaning of the legislature, when it was at all clearly apparent. In Pennsylvania, prior to the constitution of 1874, it had expressly been held that such assessments were taxes and could be nothing else. The Act of 1874 exempts "from all and every county, city and borough, road, school and poor tax." It was passed May 14, 1874. It is of one section, and is a special exemption Act—not part of general law authorizing taxation. It shows, as to charitable and religious institutions, a desire to exempt only those which are strictly and purely public charities—and only such of their property as is in actual occupation—and these institutions it includes with "court house, jails," in the exemption above. "All and every" would seem to be a complete and thorough exemption—and coupled with the fact that a road tax—a special tax on the surrounding property for a special expenditure—so levied because it is supposed that the immediate locality will be chiefly

Benefitted—is included in the provisions of the Act, would seem to make the meaning of the legislature too clear for argument. It is true a road tax is not levied by the front-foot rule—but it is the same in general principle. In addition to this, as before noticed, "tax" included municipal assessments, according to the law as it stood when the Act was passed. Now, let us return for a moment to *Eric v. The Church*, 105 Pa. 278. Here we find some of these arguments recognized, and we are truly told by the court (GORDON, J.), that "the Act speaks in no doubtful terms concerning the exemption of this kind of property from every variety of city tax," and that, as every one knows, that jails and court houses are not intended to be taxed at all, churches, etc., being classed with them, are also free—either both are free, or neither is free—and "if this is not the true meaning of the Act, I confess my inability to understand it."

But all this may be considered, perhaps, beside the mark. The court expressly overrules its former decisions, and it may, therefore, be useless to quote them. It will not, I think, however, be obvious to the profession that consonancy with decisions of other states, in a matter of internal policy like this, was important, or even desirable. It is implied in the tenacious clinging to local self-government that different localities may and will desire different laws. And it can hardly be said that the desired consonancy is secured—for it will be difficult to show that the weight of authority would construe such a statute in this way. Statutes are to be construed according to the plain meaning of their words, unless there be some strong reason to suppose that they are intended to have some unusual meaning—this is a well recognized rule of construction, and it is another well-known rule that a State Legislature is free to pass any laws *not prohibited* by the constitution—it does not, therefore, depend for its right to pass exemption laws upon any constitutional grant. See Am. Encyc. Law, Vol. 25, p. 156. And this does not seem to be questioned elsewhere. The effect of the decision will be to go down deeper into the pockets of those who have established charities and churches—and who by so doing have performed a noble public service.

It is not worth while to argue so plain a proposition as that both charities and churches save the community from terrible charges and evils—and an uncalled for check to the altruistic spirit of those who have some care for their fellow men must be deplored, as it seems to me, as retrogression. It will not do to push these considerations aside as mere sentimentalism. Some years ago the late venerated Judge Sharswood declared that Christianity was part of the common law of Pennsylvania; and if she is alone in her policy, it is a position in advance, not in the rear. Why change, when even the pecuniary gain to the treasury of any municipality would be inconsiderable—scarcely appreciable by the tax-payers—and yet the burden upon deserving charities would be very severe? *Tempora mutantur—et nos mutamur in illis*—six long years have rolled around since the court expressed its regret that it could not relieve a home for aged women, even of the duty of repairing a sidewalk; and its views have completely changed. Many, however, who agreed with court in its regret, are of the same opinion still. I intend, I need hardly say, no disrespect to the court, and, as Judge Woodward said, in the Conscript Cases, I must be understood as conceding to others the freedom of opinion and rectitude of purpose, I claim for myself—and in this spirit it is that I add, with him, “God save the commonwealth if such a precedent is to be established!”

LUCIUS S. LANDRETH.

FEDERAL TAXATION OF INHERITANCE

The Tariff Act of 1894, in § 28, provides, "that in estimating the gains, profits, and income of any person, there shall be included all income derived from . . . money and the value of all personal property acquired by gift or inheritance. . . ."

In denying the power of the State of California to tax the franchises of the Central Pacific Railroad Company, Mr. Justice BRADLEY thus expressed the views of the Supreme Court of the United States :

"Taxation is a burthen, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said, in *McCulloch v. Maryland*, 'The power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme laws of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from and is a portion of the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government and repugnant to its paramount sovereignty. It may be added that these views are not in conflict with the decisions of the court in *Thomson v. Pacific Railroad*, 9 Wall. 579, and *Railroad Co. v. Peaston*, 18 Wall. 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations:" *California v. Pacific Railroad Co.*, U. S. 1, 41.

Students of political economy have defended the taxation of inheritances, especially when of personalty, on quite a number of grounds, some rather fanciful.

Their various arguments have been briefly and clearly

stated in an interesting monograph by Max West, Ph. D., University Fellow in Finance, Columbia College. The arguments which will demand the lawyer's attention are two:—

One is that succession to the estates of decedents is a privilege, dependent upon the will of the state; and very respectable authority advocates carrying this doctrine to the extent of holding that the state is universal legatee, possessed of the power of withholding even every part of such estates from the relatives. The view of those who maintain this argument, in either its minor or full scope, is that the inheritance tax is the fee for the license to succeed.

Another argument is that the tax is upon the property transmitted. This is rather the view of a public financier than of a lawyer. The financier is aware of the escape of great proportions of personalty from all taxation, and would seize the opportunity of subjecting it to the tax collector as it passes through the Orphans' or Probate Courts.

The second proposition has not received judicial recognition, beyond a dictum or two.

The nature of the "tax" as an excise tax has been recognized with frequency, and by the highest authority.

In 1858, Judge Lee, of the Court of Appeals of Virginia, said of a collateral inheritance tax statute:

"The right to take property by devise or descent is the creature of the law and secured and protected by its authority.

"The legislature might, if it saw proper, restrict the succession to a decedent's estate, either by devise or descent to a particular class of his kindred, say to his lineal descendants and ascendants; it might impose terms and conditions upon which collateral relations may be permitted to take it; or it may to-morrow, if it pleases, absolutely repeal the statute of wills and that of descents and distributions, and declare that upon the death of a party his property shall be applied to the payment of his debts and the residue appropriated to public uses. Possessing this sweeping power over the whole subject, it is difficult to see upon what ground its right to appropriate a modicum of the estate, call it a tax or what you will, as the condition, upon which those who take the estate shall be per-

mitted to enjoy it, can be successfully questioned : " *Eyre v. Jacob*, 14 Grattan, 430.

In 1866, similar language was used by Judge Butler, then of the Pennsylvania judiciary and now of the United States Circuit Court. He said : "What is called a 'collateral inheritance tax' is a bonus, exacted from the collateral kindred and others, as the condition on which they may be admitted to take the estate left by a deceased relative or testator. The estate does not belong to them, except as a right to it is conferred by the state. Independently of government, no such right could exist. The death of the owner of property would necessarily terminate his control over it, and it would pass to the first who might obtain possession. The right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the state sees fit to impose. See *Blackstone's Commentaries*, 2nd book, pp. 10, 11, 12 and 13. We see the state continually imposing new conditions, sometimes enlarging, at others restraining the privilege, and sometimes again entirely taking it away by changing the parties who are to succeed. In Pennsylvania, up to 1833, we followed the rule of common law in ascertaining the 'next of kin.' Since that time we have pursued the rule of the civil law, which by employing a different mode of computation frequently confers the estate on an entirely different class of kindred. Up to 1855, if an intestate left brothers and sisters entitled to inherit, and also the grandchildren of a deceased brother or sister (their immediate parent also being dead), the brothers and sisters took the entire estate. Since that time they are required to share it with the grandchildren. Up to the same period, when nephews and nieces, the children of several brothers and sisters, alone, were entitled to inherit, they shared the estate equally ; since that time they take *per stirpes*, so that if there be six, one of them representing one deceased brother and the other five another, this one now takes as much as the other five. These instances are sufficient for illustration ; they might be almost indefinitely multiplied. They show how constantly the state

asserts its right to control the disposition of decedents' estates. And it does so, whether there be a will or not. If the decedent leaves a wife, the state gives her more than one-third of his personalty and a share of his realty, though he may have willed otherwise. Blackstone, in speaking of this subject, says: "Nothing varies more than the right of inheritance and testament, under the different national establishments. In England, particularly, is this diversity carried to such a length as if it had been meant to point out the power of the law in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. For instance, in the personalty the father may succeed to his children; in landed property he never can be their heir by the remotest possibility. In general, only the oldest son, in some places, only the youngest, in others, all the sons together, have a right to succeed to the inheritance. In realty, males are preferred to females, and the eldest male will usually exclude the rest, while, in the disposition of the personalty, females are admitted with the males, and no right of primogeniture is allowed." I repeat, therefore, as the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose:" *Strode v. Commonwealth*, 52 Pa. 182.

The Supreme Court of Maine has recently expressed similar views. It says: "The constitution guarantees to the citizen the right of acquiring, possessing and protecting property, Art. 1, § 1, which includes also the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution or that of the United States which secures the right to any one to control or dispose of his property after his death, nor the right to any one, whether kindred or not, to take it by inheritance. Descent is a creature of statute, and not a natural right: *2 Blackstone's Com.*, pp. 10, 11, 12, 13; *Strode v. Com.*, *supra*. At common law, prior to the statute of distribution in England, 22 and 23 Car. II, descent of personal property could hardly be recognized, and even after the statute requir-

ing administration to be granted, the administrator, after the payment of the debts and funeral expenses of the deceased, was entitled to retain to himself the residue of his effects, the court holding that there was no power to compel a distribution: 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 442. Degrees of kindred and the laws of descent, in the several states of the Union, differ widely. In this state, there have been frequent changes in the law governing the subject. It is entirely within the province of the legislature to determine who shall and who shall not take the estate, and the proportion in which they may take, and whether severally or as joint tenants, *per capita* or *per stirpes*. In the absence of constitutional prohibition, the legislature is supreme, and may dispose of an intestate decedent's estate, after payment of his debts, to any class or classes of his kindred, to the exclusion of any class or classes. It may limit heirship to lineal descendants, to the absolute exclusion of all collaterals.

"While it has always been the policy of our law to allow collaterals to inherit in default of lineal descendants, and to allow the disposal of estates by will, which take effect only at the death of the owner, and when his ownership has ceased, the policy may be changed if the legislature so determine; and it is competent for it, if it chooses, to retain this general policy, and to annex to the privilege of taking a decedent's property, by descent or will, such conditions as it may deem wise. An excise tax upon the value of the property so allowed to be received by the collateral or stranger to the blood, leaves him in much better condition than an absolute withdrawal of the privilege would. He cannot complain of unjust taxation, when the state allows him to take a property, subject to a duty of two and one-half per cent., when the state has the right to exclude him from the whole:" *State v. Hamlin*, 86 Maine 504. See also the language of the court in *Minot v. Wintthrop* (Massachusetts), 38 N. E. Rep. 514.

In *Mayer v. Grima*, 8 How. 490, the United States Supreme Court say of a Louisiana statute affecting successions of aliens, etc.: "Now, the law in question is nothing more than an exercise of the power which every state and sovereignty

possesses of regulating the manner and terms upon which property, real or personal, within its dominion, may be transmitted by last will and testament or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

In *Brettinn v. Fox*, 100 Mass. 234, the Massachusetts court say: "The objection of the respondent that the statute could not constitutionally limit the owner's power of testamentary disposition is equally novel and unfounded. The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away or limited and regulated in whole or in part, by the legislature; and no exercise of legislative authority, in this respect, is more usual than that which secures to a widow a certain share in the estate of her husband."

In *United States v. Fox*, 99 U. S. 315, after premising that the several states of the Union possess the power to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent and the extent to which a testamentary disposition of it may be exercised by its owners, it was held that the United States could not succeed by a devise of land to it in New York, the law of that state not authorizing such a devise.

The state, then, with a view to the tranquility and welfare of the entire community, appoints certain persons as the distributees of the estates of decedents, either as legatees, devisees, next of kin or heirs. These persons derive their title directly through the state law. Now it is upon this very appointing transaction that it is proposed to impose a federal tax. Congress would say in effect to the state that it should not name any one to take by virtue of its appointing power except subject to a tax upon such taking. Is this constitutional?

In *Scholey v. Rew*, 23 Wall. 331, the validity of the succession taxes imposed by the United States Statutes of 1864 and 1866, was considered. The validity was sustained. It was said of the case by the Massachusetts Supreme Court: "There was no room for any contention that the Congress of the United States could regulate in the states the transmission

of property by will or inheritance, and the question was whether it had authority under the taxing power to impose such taxes. The decision was that such taxes were not direct taxes, but excises or duties, and, as such, within the authority of Congress to lay and collect without apportionment among the states : " *Minot v. Winthrop*, 38 N. E. Rep. 514.

The attention of the Supreme Court, in *Scholey v. Rew*, was directed to the question just indicated, whether succession taxes are direct taxes, or whether they are excises ; and consideration was not given to the interference with the prerogative of the state through such legislation by the national government.

That case was decided in 1874, before the subject of inheritance taxation had attracted the attention since bestowed upon it.

In *Cooly on Taxation*, that eminent jurist says : " The federal government is also without power to tax the corresponding means or agencies of the states, or the salaries of state officers ; the state in the exercise of its functions being entitled to the same immunity from congressional interference that the nation is from that of the state : " p. 85.

" If the states cannot tax the means by which the national government performs its functions, neither, on the other hand, and for the same reasons can the latter tax the agencies of the state governments : " *Cooly Const. Lim.* 483.

The familiar language of Chief Justice MARSHALL may be quoted here : " That the power to tax involves the power to destroy ; that the power to destroy may defeat and render useless the power to create ; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied : " *McCulloch v. Maryland*, 4 Wheat. 431.

So much of the Internal Revenue Law as required process in state courts to be stamped, as a condition of the validity of legal proceedings, was pronounced unconstitutional and void : *Fifield v. Closs* (1867), 15 Mich. 505 ; *Warren v. Paul* (1864),

22 Ind. 276; *Union Bank v. Hill* (1866), 3 Cold. (Tenn.) 325.

"There is nothing in the constitution which can be made to admit of any interference by Congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation, is quite as much beyond the power of the National legislature as if the interference were direct and extreme:" *Fifield v. Close*.

In *State v. Garton*, 32 Ind. 1, it was held that Congress has not power under the constitution to impose a tax upon official bonds given to a state by its officers, that the acts of Congress requiring instruments to be stamped, if they meant to affect such bonds, went beyond the Congressional power and were in so far unconstitutional.

The nearest case, in principle, to the subject we are now considering, is, perhaps, that of *Sayles v. Davis*, 22 Wis. 225, where it was held that Congress cannot, without the consent of the state, impose a stamp duty upon tax deeds executed under the laws of the state.

Mr. Justice NELSON in *Collector v. Day*, said: "The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the states within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states:" 11 Wallace, 113. In this case, it was held that it is not competent for Congress under the constitution of the United States to impose a tax upon the salary of a judicial officer of a state.

If we trace back the history of federal taxation of successions to decedent's estates, we will see that such legislation does not come to us well accredited and approved. On the contrary, it comes to us discredited by the accompaniment of

false and ill-considered ideas, ideas which have been rejected in the courts.

On April 17, 1794, it was recommended by a committee of the House of Representatives that certain stamp duties should be imposed, including the following:

On inventories of the effects of deceased persons, ten cents.

On receipts for legacies or shares of personal estate, where the sum is above \$50 and not exceeding \$100, twenty-five cents; more than \$100 and not exceeding \$500, fifty cents; for every further sum above \$500, one dollar. Not to extend to wives, children or grandchildren.

Two years later, the Committee on Ways and Means reported to the House: That a duty of two *per centum ad valorem* ought to be imposed on all testamentary dispositions, descents and successions to the estates of intestates, excepting those to parents, husbands, wives or lineal descendants: U. S. St. at L. 527.

By the Stamp Act of July 6, 1797, there was imposed a tax of fifty cents on inventories; and a tax, varying according to amounts received, on receipts for legacies and distributive shares of personal estate. The widow, children and grandchildren were exempt. The Act ceased July 1, 1802, by repeal, and was in force four years.

In 1815, the financial necessities of the war of 1812 induced the Secretary of State to recommend three different inheritance taxes, one on all testamentary instruments and letters of administration. The measure was abandoned, the treaty of peace having, even then, been signed.

In the Revenue Tax Acts passed to gather income for the preservation of the Union, etc., taxes were imposed on inheritances, on probates and letters of administration, and on bonds of executors and administrators, by Acts of July 1, 1862, June 30, 1864, July 13, 1866, March 2, 1867.

The legislation just narrated has been taken in substance from the admirable monograph by Max West, already mentioned. It manifests but one thought, namely, to raise revenue; the legitimacy of the means was not considered. The provisions for taxes on judicial process in the states, on inven-

tories, etc., manifest the carelessness as to regular methods, so only that revenue was raised. Those provisions have fallen through their repugnance to constitutional law; shall the tax on inheritance be sustained?

What power in the state shall control the United States if the latter has power to tax successions? What limit can be fixed to the latter's power, other than its own discretion? The taxation may be so heavy that the state will find itself prevented from similar taxation. Its regulations may be embarrassed, and rendered unsuitable by reason of the manner in which the federal authority is exercised.

And yet it was declared, in *United States v. Fox*, 94 U. S. 315, that the power to regulate the descent and testamentary disposition of real estate, and it is true also of personalty, is in the state.

Let us quote again from *California v. Pacific Railroad Company*, mentioned at the beginning of this article, and apply the language to the power to succeed to decedents' estates: "The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it, is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty."

LUTHER E. HEWITT.

THE CONSTITUTIONALITY OF THE INCOME TAX.

By WM. DRAPER LEWIS, PH.D.

As this magazine goes to press, there is being waged in the Supreme Court of the United States a battle royal over the constitutionality of the income tax, passed by the Congress which has just expired. There is a growing tendency in our American public thought to turn from the decisions of our legislatures, on lines of governmental policy, to the courts. All legislation is rapidly tending to become unconstitutional in the eyes of those who do not want it. Our own prepossessions are, we confess, strongly against an income tax of any kind at the present time. But it cannot be too often repeated that the economic expediency of the tax is not before the court, but rather the power of Congress to pass such a tax at this or any other future time, no matter what may be the needs of the government to secure a large revenue. The power of the government to raise money through taxation is essential to its existence, and should, it seems to us, be curtailed by constitutional provision and interpretation as little as possible.

There are three reasons, or classes of reasons, which are being urged on the court to induce the judges to declare the law void. First, it is said to be a direct tax, and, as such, not laid in the manner provided for in the Constitution. Second, it is said to be a class tax, and, thirdly, an unequal tax. Let us look at each of these objections in the order named.

The second section of the first article of the Constitution provides that ". . . direct taxes shall be apportioned among the several states . . . according to their respective numbers," and the ninth section of the second article says, that "no capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken." It is needless to point out the fact that this peculiar provision in the

Constitution of the United States was the outcome of state jealousies at the time of the adoption of the Constitution. It always has been, and always will be, a bugbear in the way of just and equitable taxation on land or on anything else which the Supreme Court declares falls in the class on which taxation, when laid, is declared to be direct taxation. For instance, a tax on land must be assessed according to its value, or according to its acreage. Whether a tax on the rents received from land is a tax on land, is a mooted question, and one of the minor points presented by this case. Whether Congress adopts, in assessing taxes on land, the acreage or the value as the basis of the assessment, the tax, instead of falling equally throughout the Union on lands of equal value or equal area, falls, in consequence of this obnoxious provision in the Constitution, in a different ratio on the lands of each state. The value of land *per capita* in New York may be twice as great as the value of land *per capita* in Texas, or *vice versa*. In the former case the rate in New York would be twice as great as the rate in Texas. For instance in the income tax of 1861 (12 Stat. at Large, 294), New York was taxed two million one hundred and sixteen thousand dollars and over, while Pennsylvania was taxed one million nine hundred thousand. Yet the relative value of the land in the two states was not as the tax. To declare an income tax, or any other tax, a direct tax, is equivalent to saying that Congress cannot pass such a tax without committing great inequality and injustice—practically, that Congress cannot tax the subject at all, except possibly in time of war, because the rate at which any income would be taxed would vary in each state. This, it may be urged, is treating the question only from the standpoint of practical expediency. However undesirable the method for assessing direct taxes, the provision in the Constitution, as to the manner in which such tax should be assessed, is plain. This is true, but what is meant by the term "direct taxes," is not at all plain. If we put the question "what did the Constitutional Convention mean by 'direct taxes?'" the only answer which historical records give us is, that the term "direct taxes" was used in as loose and indefinite way by our ancestors as it is by our

modern political economists.¹ Since the words themselves will bear almost any construction which the court in its wisdom chooses to put upon them, and since to declare a tax a direct tax is practically to say that Congress has no power to pass such a tax, every consideration of public policy would seem to urge the court to curtail in the present instance as they have curtailed in the past, the definition of direct taxes under the Constitution, confining the meaning of the term to a capitation tax and a tax on land. When the words of the Constitution will admit of one of two meanings, one of which causes the instrument to provide for injustice and inequality, that meaning should not be adopted. This was the gist of Mr. Justice CHASE's argument in the case of *Hylton v. United States* (3 Dall. 171). The question there was whether a tax on carriages was a direct tax. He says (p. 174): "If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."²

The case was followed in that of *Springer v. United States* (102 U. S. 586), a case in which the Supreme Court, without a dissenting voice, declared an income tax constitutional and not a direct tax.

It may be an unwise economic policy which to-day passes an income tax; but the court is deciding not only for to-day, but for all future time. Those who are asking the judges to declare the tax a direct tax are asking them to say, that no matter what the financial strait of the national government, money cannot be raised by an income tax, though this method of procuring revenue has been adopted by our government in time of great financial need, and is now in operation in almost every civilized country of the world.

If an income tax is not a direct tax, it is undoubtedly within the power of Congress to say that all incomes, except

¹ See review of historical matter in op. of Mr. Justice SWAYNE, in case of *Springer v. United States*, 102 U. S., p. 592, *et seq.*

² Such substantially is Hamilton's Argument. See Works, Vol. VII., p. 84, where his brief as counsel in the case is given.

those received as salaries from the state government, or as interest on the bonds of the states, shall be taxed.

The next question is, therefore, whether in laying such a tax Congress can define the class of incomes to be taxed, saying that all over a certain amount shall be taxed, while those under that amount are exempt. It is admitted by all that a wide discretion is vested in Congress, in defining a class of subjects to be taxed. For instance, Congress can tax all wagons; they can also tax all pleasure carriages; or, curtailing the class still more, all pleasure carriages with two wheels; or, still again, all pleasure carriages with two wheels of a diameter over a certain number of inches. However foolish such fine distinctions would be, one would hardly contend that Congress had exceeded the discretion vested in it of selecting the class of property to be taxed. Again, Congress can undoubtedly tax the income of all persons of a particular class, as, all the fees of brokers or the gains of all bankers. Now, the critical point, in the case before the court, is whether the line can be drawn, not as to sources of income but as to amount of income. The old income tax drew the exemption line at six hundred dollars. This tax draws it at four thousand dollars. If this limit is unconstitutional, the old limit is also unconstitutional. The question of where the limit should be drawn, if it can be drawn at all, is simply a matter for Congress to determine. If Congress has no power to make one limit, it has no power to make another. This general argument may be excepted to on the theory that, while all exemptions in an income tax are unconstitutional, one limit, as an exception, will be admitted—that is, where the income of the person who would otherwise be taxed is so small that there is danger of his becoming a charge on the community. It might be contended that while Congress had, as a general proposition, no right to exempt any income, no matter how small, a very low limit might be upheld, perhaps, on some new theory of the police power.

The main question, therefore, in this case, is whether there is vested in Congress any discretion, in laying an income tax, to say that incomes under a certain point will not be taxed.

Those who advocate the curtailment of the power of Congress in this respect, in order to sustain their arguments, immediately put an extreme case. We have heard, for instance, an argument like this :

"Supposing Congress were to tax incomes over one hundred thousand dollars, eighty per cent., while exempting all below one hundred thousand dollars. Would this not clearly be an unwarranted exercise of congressional discretion for the purpose of confiscating the property of a particular class of people?" For one, we would have no hesitation in answering such a question in the affirmative. But the main ground on which the unconstitutionality of such an act would rest, would not be that the line was drawn at one hundred thousand dollars, but that the amount of the tax, in view of the narrow class on which it fell, rendered the whole proceeding not a law, but a tyrannous exercise of arbitrary power. The present income tax is exceedingly moderate in amount. It is, in no sense, a confiscatory tax. True, it only falls on property of a particular class, *i. e.*, property received by persons having more than four thousand dollars a year. But the classification of subjects to be taxed is under the discretion of Congress. The only limit which can fairly be put on this discretion is, that the amount of the tax, in connection with the subject taxed, must not be so arranged as to amount to a confiscation of the special subject on which the tax is laid.

While admitting the strength of many of the able arguments now being urged before the Supreme Court on this point by those opposed to the tax, the radical fault of all seems, to the writer, to be that it is assumed the income tax is a tax on persons rather than a tax on property. If it was a tax on persons, a sort of capitation tax, no one would doubt its unconstitutionality. The Congress has no more right to say that persons of over four thousand dollars income shall be taxed a definite sum per capita, while those under four thousand dollars shall be exempt, than they have to tax all people over six feet high. But it is a principal of taxation that a tax falls on that which is the basis of its assessment. The basis here is income, not the individual. The tax is paid by individuals ; but that can be said

of all taxes. The tax is a tax on property received during the year over four thousand dollars, not a tax of so much a person on all persons having an income of over four thousand.

The third argument against the tax is that it is unequal—that is, falling on persons or things of the same class unequally. There are many supposed inequalities pointed out. One of the chief is as follows: If I have an income from the bonds and stock of corporations, I have to pay the tax, even though I have an income of less than four thousand dollars a year. I suppose it will be admitted by all that a tax on the dividends of corporations is constitutional; also that there is no constitutional prohibition against taxing two subjects in the same tax law. It seems to us that this is all that Congress has done in the act in question. They have not taxed one person twice for the same property, and another person once for the same species of property; but they have taxed all incomes from corporations and all incomes which exceed four thousand dollars, allowing those persons who have already paid a tax on corporation stocks and bonds to deduct that tax from the income tax which they would otherwise have to pay. Wherein, as a result of the whole law, is a man who has to pay an income tax, because his income is over four thousand dollars, better or worse off, because of the possession of property in corporations? The man who has not an income of four thousand dollars cannot complain if the United States chooses to tax his income from a specific class of property.

Another complication of the law is the tax on incomes from inheritances of personal property. All men who receive inheritances are not taxed, but only those who receive inheritances of personalty which, coupled with their income during that year, exceed the sum of four thousand dollars. We fail to see why, if Congress can fix any lower limit of taxation on money received during the year, they cannot particularize what shall be considered income. Declaring that money from gift or devise shall be considered as income for the purposes of the assessment, and selecting a definite class of property, so received, as personal property, does not viciate the tax other-

wise constitutional. This last claim of inequality, therefore, really comes back to what we have stated to be, in our opinion, the crucial point of the case; that is, whether Congress can draw any lines in an income tax, exempting incomes under a particular figure.

We might also point out that on the decision of this point there depends another and still more important question. If Congress cannot draw any lines, below which incomes will be exempt, neither can they draw any lines making different rates of taxation for different incomes, as all incomes above five thousand dollars, three per cent., between four and five thousand, two per cent, and under four thousand, one per cent. Thus an adverse decision of the court in this case would prevent Congress from passing what is known as proportional income tax, or a proportional tax of any kind. If this present tax is unconstitutional on the ground of inequality, the income tax of 1862 was void. That law taxed incomes over six hundred dollars, at the rate of three per cent., while incomes over three thousand dollars paid five per cent.

DEPARTMENT OF TORTS.

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HOWE V. OHMART. 7 Ind. App. 32; 33 N. E. 466. INDIANA
APPELLATE COURT. FEBRUARY 28th and JUNE 12, 1893.

REINHARD, C. J.—This was an action to recover damages for injuries inflicted upon the plaintiff below by falling through an opening in the floor of the defendant's school building, where he had gone under the following circumstances: The plaintiff had been a former student at the school, and upon the evening in question had returned at the invitation of certain of the students to attend the meeting of a literary society, of which they were members. The meeting was held, and the invitation to plaintiff (with those to others) was sent out with the approval of the college authorities, who furnished light and heat for the occasion. The plaintiff left the meeting-room, alone, upon a necessary purpose, and turning into a hallway fell into an opening in the floor, which had been only partially protected, and received the injury for which he complained.

The defence, beside that of contributory negligence was upon the ground that the plaintiff was merely a trespasser or at most a licensee, to whom no duty of care was owed, and to whom they were consequently not liable. Upon the above suggested evidence the court held that "the jury were justified in drawing the inference that the appellee was neither a trespasser nor a mere licensee, but was there upon at least the implied invitation of the college authorities." . . . "and that the appellants owed him the duty to protect him from dan-

gerous pitfalls or other obstructions when he was in the building.

Verdict for the plaintiff affirmed, and a rehearing was subsequently denied.

THE DISTINCTION BETWEEN THE LIABILITY OF A PROPERTY OWNER FOR INJURIES TO GUESTS AND TO INVITED PERSONS.

That the insufficiency of language has been the cause of much uncertainty in the law, as well as in other branches of learning, is demonstrated by a consideration of the principles involved in this case. It has been unquestioned law for many years that the owner or occupier of real estate owes certain duties to those who come thereon, according to the cause of their entry, and the nature of the danger to which they are exposed. To trespassers it is only against active injury, to licensees it is to give notice of hidden dangers or traps, while to invited persons (as that term is understood by the law), the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on to save his guest from injury while upon the premises. But the difficulty which is instantly met in this class of cases, is to distinguish between licensees and invited persons. In other words to ascertain the exact scope of the word "invitation" as legally used. The language cited with approval in the principal case from *Evansville, &c., R. R. v. Griffin*, 100 Ind. 221, is characteristic of that found in many. "If the owner or occupant of lands, by any enticement, allurement or inducement, causes others to come upon or over his lands, then he assumes the obligation to persons so coming to provide a reasonably safe and suitable way for the purpose." The latitude in these words, however, is so great as to render them of very little practical value, for they can easily be stretched to cover a great many cases which no court would include within the invitation class. Indeed, the earliest case in which the property owners' liability to guests was considered, is against a liberal construction. In *Southcot v. Stanley*, 1 H. & N. 247 (1856), the plaintiff was the guest of the proprietors of a hotel, and was injured by the breaking of a glass door, which

was in an unsafe condition. The court refused a recovery, POLLOCK, C. B., upon the ground that a social visitor must be considered as a member of the family into which he comes, and consequently entitled to no greater care. "Whilst he remains there," said the Chief Baron, "he is in the same position as any other member of the establishment so far as regards the negligence of the master or his servants." And Baron BRAMWELL, upon the ground that he was a licensee only, and entitled to no special care, saying, "If a person ask a visitor to sleep in his house and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply of omission." The extreme position of Baron POLLOCK has never been accepted and cannot be maintained: *Pollock on Torts*, *427; *Clerk v. Lindsell on Torts*, 59.

And while the general thought of Baron BRAMWELL is less open to attack, the illustration is not good, for if a person ask another to sleep in his bed, he is bound in common prudence (which is the test of all these relative duties) to see that the bed is as safe as such places usually are, and a simple warning of a possible danger will not, it is submitted, be sufficient.

This decision has been sufficient, however, to justify a number of writers in saying, that the test of "Invitation" is direct or indirect pecuniary gain, and that a guest in the ordinary acceptation of the word is not an invited person at all, but simply a licensee.

Thus Campbell (on Negligence), says: "Invitation is inferred where there is a common interest or mutual advantage, while a licensee is inferred where the object is the mere pleasure or benefit of the person using it." And again, "Invitation therefore, in the technical sense of the word, differs from invitation in the ordinary sense—implying the relation of host and guest. In the case of host and guest it would be thought hard that the hospitality of the former should expose him to the responsibilities implied by the business relation. The guest must take the premises as he finds them, with any risk of their disrepair; although the host is bound to warn his guest of any concealed danger upon the premises known to himself."

Mr. Pollock says (Torts, *427): "A guest (that is a visitor who does not pay for his entertainment) has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee."

And Wharton says (Negligence, § 350): "A man does not undertake to make his house safe so far as concerns mere visitors."

In the late case of *Plummer v. Dill*, 156 Mass. 426, the court said: "It is well settled that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the subject of the visit may not be for the benefit of the occupant."

Such a doctrine as this has the undoubted effect of simplifying the question, and a great many cases are easily and rightly disposed of by it. In *Benson v. The Baltimore Traction Co.*, 26 Atlantic Rep. 937 (1893), the plaintiff was one of a class of boys who was given permission by the president of the defendant company to visit their power house and view the machinery. While walking about he fell into an open pit of hot water, which was allowed to remain unfenced, and was seriously scalded. A recovery was denied, upon the ground that there was no possible mutuality of interest in the visit, as it was only for the instruction of the boys, and the simple permission could not be construed as an invitation. In this case the mutuality rule is applied with great force and the result is very satisfactory. In the following cases decisions were reached which are entirely conformable to the rule:

In *The Oil Co. v. Norton*, 70 Tex. 400; S. C., 7 S. W. 756, a person was permitted to enter the defendant's works to speak to an employé and was injured while there.

In *Weeks's Ad. v. C. & C. R. R.*, 15 S. E. 81 (W. Va.), 1892, the plaintiff went on defendant's land to speak to a telegraph operator employed there and was injured.

In *Lachat v. Lutz*, 22 S. W. 218 (Ky.), 1893 the plaintiff

entered defendant's premises to deliver a message from an employé and was injured while there.

In *Streger v. Van Seclin*, 132 N. Y. 499, a woman was injured by the fall of a stairway in an old building, where she had gone to seek her children, who were accustomed to play there.

In *Laramore v. The Crown Point Iron Co.*, 101 N. Y. 391 (1886), the plaintiff went to the defendant's mine to seek employment, and was injured by some of the machinery there operated.

In *Walker v. Winsteddy*, 155 Mass. 301 (1891), the plaintiff went into defendant's house to seek kindling wood and fell down a flight of steps. See, also, *Gillis v. Penna. R. R.*, 59 Pa. 129 (1868); *Rodegan v. B. & M. R. R.*, 155 Mass. 44 (1891); *Metcalf v. Steamship Co.*, 147 Mass. 67 (1888); *Parker v. Portland Pub. Co.*, 69 Me. 173; *Sullivan v. Waters*, 14 Ir. C. L. 460 (1864).

In none of these cases was a recovery allowed, and in none was there such a mutuality of interest as to bring them within the rule. To this extent then the rule appears true. But it must also be recollected that they are all typical license cases, and without a forced construction there was no "inducement or allurements" held out. Nor was there any express invitation to enter the premises where the accident happened. The nearest was a license solicited and granted. It cannot be said, therefore, that the mutuality rule gathers any material strength from them as against the ordinarily understood distinction between license and invitation.

On the other hand the rule includes all those cases which are universally admitted to fall within the "invitation" class, such as where one who enters the store of another to buy goods and is injured while there: *Clapp v. Mear*, 134 Pa. 203 (1890); *Gordon v. Cummings*, 152 Mass. 513 (1890); *Freed v. Cameron*, 4 Rich. L. 228 (1851); and where the defendant's excursion wharf was so defective that the plaintiff, who was lawfully thereon, fell and was injured: *O'Callaghan v. Bode*, 84 Cal. 489 (1890); *Campbell v. Portland Sugar Refining et al.*, 62 Me. 552 (1873).

In these cases, there was a clear mutuality of interest or direct or indirect expectation of pecuniary profit resulting from the visit. A storekeeper is considered as constantly holding out an invitation to all persons, desiring to do business with him to enter for that purpose, and, if this invitation is accepted, the responsibilities of invitation attach to the host: *Clapp v. Mear, supra*.

With this understanding of the mutuality rule, the principal case becomes of great interest, as the decision of the court would bring it within the invitation class, and, consequently, the interest of the defendant in the visit of the plaintiff must be found. But did the college derive any benefit from the visit of the plaintiff? He came simply as a visitor to the meeting of the literary society, and the only part played by the college itself was in permitting the invitation to be sent to the plaintiff and allowing their building to be used for the meeting. By a forced construction of the facts of the case it might be argued that the invitation was to be considered as an advertising scheme, which, eventually, might result in some benefit to the defendants, and thus the requirements of the rule be satisfied.

But such was not the position of the court, nor was the mutuality rule mentioned, but having invited the plaintiff upon the premises, and, consequently, in any sense of the word, "induced" or "allured" him to enter, they "owed him the duty of protection from dangerous pit falls or other obstructions while in the building," and this is nothing more nor less than admitting the plaintiff to the class of invited persons without the existence of any mutuality of interest in the visit.

The case of *Davis v. The Central Congregation Society*, 129 Mass. 167 (1880), was somewhat similar and equally irreconcilable with the mutuality rule as laid down by the text writers already quoted. The plaintiff was injured by reason of the dangerous condition of a way leading to the defendant's church, where she had gone upon an invitation sent to another congregation of which she was a member. A recovery was allowed, and no attempt was made to discover any mutual or pecuniary interest in the visit. The court said: "The fact that

the plaintiff was induced by the defendant to enter upon a dangerous place, without warning, is the negligence which entitles the plaintiff to recover." The only possible ground upon which a mutuality of interest could be assumed in this case would be, that the church was intended for just the purpose for which the plaintiff attempted to enter it. But wherein would the case then differ from a private drawing room to which a guest has been especially invited, or the hotel where the guest suffered his injury in: *Southeast v. Stanley, supra*.

These cases are not only opposed to the rule as laid down in the text books, but they show a fatal weakness in it, as in both cases the rule would have barred a recovery, and in both the decision of the court appears to everyone as fair and necessary under the circumstances.

The solution of the difficulty probably lies in the division of the subject into express and implied invitation, and limiting the mutuality rule to the latter class only. Such a destruction is hinted at by Bigelow (Torts, 326), where he says: "In regard to this class, it is to be observed that if there be *no actual invitation* to the injured person to go upon the premises in question, in order to recover damages for the injuries sustained, he must have gone upon the premises for business with the occupier," and see the same thought, in *Cooley on Torts*, 604-7; *Plummer v. Dill*, 156 Mass. 426 (1892).

Likewise, the cases just noticed are in harmony with such a theory, for in both the injured party was expressly invited into danger, and, consequently, within the class of express invitation cases. And the reason of such a solution of the problem cannot but be apparent. The contractual element, which Wharton assumes in the duty owed by a property owner to one who enters thereon upon business, although convenient, is not, it is submitted, a proper basis for a settlement of his rights. Every one owes to every one else a certain degree of care with respect both to his own actions and to any property which he may possess, and that care is in proportion to the extent to which such person has put himself under his protection of the other, and in proportion to the

care which it is possible to exercise, considering the circumstances of the particular case. The trespasser is entitled to nothing, because he is a trespasser of whose presence the owner of the premises is unaware. The licensee tacitly assumes the risk of any ordinary danger, and, consequently, beyond notice of hidden pitfalls or traps, the owner is relieved of responsibility. But an invited person is acting, as it were, under the direct command or direction of his host, and because of this confidence reposed in the host an action will lie if injury follows. It is a result springing directly from the relation of the parties, and this relation, it is submitted, can as well be raised by an express invitation to a social guest as to a business caller. "The fact that the plaintiff was induced to enter into a dangerous place without warning is the negligence, which entitles the plaintiff to recover."

The position and rights of a social visitor without "express" invitation is a new and very interesting one for a discussion of which is cited *Plummer v. Dill*, 156 Mass. 426 (1892).

"C. C."

Philadelphia, March 12, 1895.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E.H. Hoag, 726 Chestnut Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

THE LAW OF MUNICIPAL CORPORATIONS, with Forms and Notes of the Decisions of the Supreme and other Courts of Ohio relating thereto. Fourth Edition. By **HIRAM D. PECK**. Cincinnati: The Robert Clarke Co. 1894.

* **A HANDBOOK OF THE LAW OF DEFAMATION AND VERBAL INJURY**. By **E. T. COOPER, LL.B.** Edinburgh: William Green & Sons. 1894.

HANDBOOK OF EQUITY JURISPRUDENCE. By **NORMAN FETTER**. St. Paul: West Publishing Co. 1895. (Hornbook Series.)

COMMENTARIES ON THE LAW OF INSURANCE. (2 Vols.) By **CHARLES FISK BEACH, JR.** Boston and New York: Houghton, Mifflin & Co. Riverside Press, Cambridge. 1895.

SOCIAL GROWTH AND STABILITY. A Consideration of the Factors of Modern Society, and their Relation to the Character of the Coming State. By **D. OSTRANDER**. Chicago: S. C. Griggs & Co. 1895.

HANDBOOK OF CONSTITUTIONAL LAW. By **HENRY CAMPBELL BLACK**. St. Paul: West Publishing Co. 1894. (Hornbook Series.)

COMMENTARIES ON THE LAW OF INJUNCTIONS. (2 Vols.) By **CHARLES FISK BEACH, JR.** Albany: H. B. Parsons, Law Publisher. 1895.

SELECTED CASES, ETC.

CASES ON CONSTITUTIONAL LAW. Part III. By **JAMES BRADLEY THAYER, LL.D.** Cambridge: Charles W. Sever. 1894.

* **THE STATUTE RAILROAD LAWS OF NEW YORK**. By **GEORGE A. BENTHAM**. Albany, N. Y.: W. C. Little & Co. 1894.

PAMPHLETS.

INCOME TAX LAW OF 1894. Paragraphed, Explained and Digested. By **JOHN A. GLENN**. Philadelphia: T. & J. W. Johnson & Co. 1895.

NATIONAL CORPORATIONS. By **J. J. H. HAMILTON**. Reprinted from *University Law Review*.

BOOK REVIEWS.

A HANDBOOK OF THE LAW OF DEFAMATION AND VERBAL INJURY. By F. T. COOPER, M. A., LL. B. Advocate. Edinburgh: William Green & Sons. 1894. Pages, 319.

This is a Scotch book on slander and libel. The law contained in it is Scotch, and almost all of the citations are from the Scotch reports. The merit of the book is in its arrangement, and the extent to which the alphabetical classification of slanderous and libellous words and phrases is carried. All of the various crimes of which a person may be charged are alphabetically arranged. Various accusations of misbehavior are treated in the same way. Under the letter "T" in one group we find the following, "Treacherous fellow, to call a man a: *Grierson v. Harvey*, 43 Scot. Jur. 190;" "Two faced man, to call a person a, *Cunningham v. Duncan*, 16 R. 383."

The Scotch law seems to be painfully sensitive of personal reputation, and, in vindicating it, goes to lengths which cannot be justified, and which certainly are not paralleled in America and England. Thus it is defamatory to say that a man is a "bad lot," "contemptible," "disgraceful," "infidel," "ignorant of religion," "insolent dogmatist," "irreligious," "a Judas," "Satanic agent," "scoffer at religion," "serpent." You cannot say that your enemy is a "scamp," or a "scoundrel," or that he has "skedaddled;" but you may find some relief in calling him a "puppy," for that is permitted without damages.

Public men are protected to an unusual extent. While sarcasm and ridicule may be used in a mild way, a continued use of these weapons in controversy is actionable. In one case a parliamentary candidate was allowed an issue against the proprietor of a newspaper, who likened him to a "viper" and a "snake in the grass;" and another newspaper was punished for saying of certain public men that they "were sturdy, bold and unblushing repudiators," that "they acted like thimble-riggers—heads I win; tails you lose." When contrasted with the amenities of our press in the treatment of political opponents, these expressions seem mild, and the severity with which they were punished suggests that Scotch

editors have not much chance to cultivate any extensive vituperative vocabulary.

Although Mr. Cooper's book may not be a necessity to the American practitioner, to the student of Scotch life and character and to the student of law in the broad sense, it is a mine of curious and interesting information. A. B. WEINER.

THE LAW OF VOLUNTARY SOCIETIES, MUTUAL BENEFIT INSURANCE AND ACCIDENT INSURANCE. By WILLIAM C. NISBET. Chicago: Callaghan & Co. Second Edition. 1894.

This edition is, in many respects, a great improvement on the first, which, as the author himself confesses in the preface to this, was necessarily imperfect, on account of its hurried preparation. The main outlines, however, have been followed; but they have been very much enlarged in detail, as well as enriched by the addition of the numerous cases decided since the first edition. These have been so abundant, as of themselves to authorize the publication of a new edition, even if the work had not stood in need of improvement.

The most valuable feature of the book is its full treatment of the principles of law governing unincorporated associations—a subject generally either disregarded, pushed out of sight in a corner of Insurance, or grudgingly given standing-room under Corporations, where it does not belong. Yet the growth of such societies has been so rapid, and some of them have attained such numerical, social, and even political strength, that they deserve a separate department of legal literature. But so long as this is denied them, (Stevick on Unincorporated Associations, a mere essay, being the only independent work thereon that has come to the writer's notice,) they can nowhere be treated of so well as in a work on this subject. Realizing that fact, the author has stated the general principles governing their formation and management, though, in many respects, these are but the merest incidents of the subject of insurance.

The author's statements of the law are clear, precise and positive,—a most excellent feature in a text-book, the proper

province of which is to state what the law is, not what it ought to be, which belongs to the essayist, nor why it is as it is, which belongs to the elementary writer. His judgment, also, on disputed points, is remarkably sound; and his reverence for *obiter dicta*, which are generally sops to Cerberus, less than 'little. In a few words, he dissipates the cloud of uncertainty cast around the question of the binding effect of the by-laws of an unincorporated association by the *dicta* that the courts will not interfere with their execution, *unless they are manifestly harsh and unconscionable*; and declares, with convincing energy, that "while a society remains unincorporated it may make regulations, *ad libitum*, for the discipline of its members, including, of course, expulsion, so long as they are not in conflict with the law. But the moment it obtains a charter it parts with the powers it before possessed, and comes under the law which governs corporate bodies." This, of course, does not apply to an illegal or wanton abuse of the by-laws.

Especially valuable portions of the work are, the chapter on "Suits against Unincorporated Societies," which contains the most complete and able discussion of that subject known to the writer, if not the only one of any substantial value; and that on the "Construction of the Designation of the Beneficiary," which is one of the most important questions in benefit insurance, and one of the most disturbed by conflicting decisions. The author's treatment of this latter is very full and satisfactory; but it may be permitted to note that he has omitted to include the question, whether or not illegitimates, when not expressly named, may take as "children" or "relatives." It has been decided that they may take as "children," under a will, in a proper case: *Hill v. Crook*, 6 L. R. H. L. 265; *contra*, *Dorin v. Dorin*, 7 L. R. H. L. 568; but not as "relatives:" *In re Saville's Trusts*, 14 W. R. 603; unless under special circumstances, as in the recent case of *In re Drakin*, [1894] 3 Ch. 565. By analogy, they should take as beneficiaries or not, under similar circumstances. He does, however, state that an adopted child will, under some circumstances, take as a "child."

There has been added to the work a discussion of the subject of "Accident Insurance," which the author earnestly hopes "may not be found to be without value." He may console himself on this score. Though brief, the chapters on this subject contain an admirable compendium of the law thereon, which lack of space forbids longer comment upon. It may not be altogether idle, however, to refer to the interesting discussion on the subject of "Voluntary Exposure to Danger;" and to that on the subject of total disability, where will be found the sound decision of the Supreme Court of Pennsylvania, that when a man, blind in one eye, before taking out a policy, loses the sight of the other, it is "a loss of the sight of both eyes," within the meaning of the policy: *Humphreys v. Assn.*, 139 Pa. 264. The rule, as is correctly stated by Mr. Niblack, is, that such policies are to be liberally construed, a rule that should be commended to the notice of the New York court, which recently decided that the loss of all the fingers and part of the palm, leaving only the second joint of the thumb, was not a loss of "one entire hand," within the meaning of the policy: *Snack v. Travellers' Ins. Co. of Hartford*, 30 N. Y. Suppl. 881. The Supreme Court of Wisconsin, however, has since held that such a question is for the jury alone: *Lord v. American Mut. Acc. Assn.*, 61 N. W. Rep. 293.

The whole book bears evidence of very careful preparation; and while, on account of its restricted scope, it cannot fairly be compared with more comprehensive and extensive works, it may be safely affirmed to be, within its own sphere, the equal of any, and, in some respects, as has been said, superior to all.

ARDENUS STEWART.

RULES OF EVIDENCE, AS PRESCRIBED BY THE COMMON LAW, FOR THE TRIAL OF ACTIONS AND PROCEEDINGS. By GEORGE W. BRADNER. Chicago: Callaghan & Co. 1895.

Recent works on Evidence have been more distinguished by their bulk than by any other feature. They have endeavored to present the subject in all its relations, forgetting that it is so intimately connected with pleading that it requires very

careful attention to keep the two separate. This is especially true of the bulky volumes of Rice on Evidence, which really amount to but little more than a digest of reported cases. The older works on the subject, such as Greenleaf, have been so patched by the necessary addition of new matter, often contradictory of the original text, as to be ill-adapted to present needs and conditions; other works, such as Stephen, have been little more than a bald statement of rules and principles, with too few citations to make it possible to satisfactorily substantiate therefrom the doctrines of the text; and yet others, such as Wood, have aimed chiefly at furnishing a practical statement of the rules that govern the admissibility of evidence in a form ready for easy use. There is, therefore, still room for a work such as this, which, while striving to present its matter in a convenient form, also aims at giving, as far as is possible, a logical statement of the rules of evidence, and their underlying principles. It therefore occupies, as the author states in his preface, a position intermediate between Greenleaf, Taylor, and the others of that ilk, on the one hand, and Wood, Stephen, and their congeners, on the other.

This makes it of especial value, for in its pages one may find not only the necessary rules that govern the admissibility of evidence, but also very many of the instances in which those rules have been applied to special circumstances. All obsolete law has, however, been carefully eliminated, for it was no part of the author's purpose to give a history of the development of the law of evidence. In fact, the citations are almost entirely confined to the latest decided cases, especially on controverted points.

In regard to questions still unsettled, the author has not permitted himself the amusement of airing his knowledge in critical dissertations. He states the rule, as he conceives it, cites his authorities, and leaves the reader to verify his conclusions, if he chooses, a method that not only saves space, but pays a delicate compliment to the sagacity of his audience.

One point that strikes the attention is, the almost entire absence of the discussion with regard to the disqualification of a witness by interest, which occupies so large a portion of

other works. This is a notable improvement. Interest, as a disqualification, has been almost wholly wiped out in this country, save in the case of suits in which the estate of a deceased person is interested, and a discussion of it is therefore a useless encumbrance. The exception noted is, of course, fully treated.

The underlying principle of the law of evidence is, as Mr. BRADNER justly states, the relevancy of the evidence offered. On this its admissibility depends. The proposition is so simple, and so self-evident, that it is a wonder that greater stress has not been previously laid upon it. And yet, as we all know, Greenleaf fails to state that doctrine clearly, although he demonstrates it plainly enough in his discussion; and others have been equally remiss. But there are some branches of evidence, which, though, strictly speaking, they do not belong to evidence at all, are yet so inseparably connected with it as to form a necessary part of any work on that subject, in spite of the fact that relevancy cannot be properly predicated of them. Such is the subject of judicial notice; which accordingly is given place in this book, and receives a full discussion.

One of the best features of this work is its completeness in matters of detail; which, from its size and scope, one would hardly have expected. But some minor matters are mentioned, that are omitted in more pretentious volumes. Such are the statements that the courts will take judicial notice of the enumeration of the inhabitants of a state, (though there is no mention of the fact that the Court of New York, in the notorious apportionment case, declined to accept that doctrine;) that an attorney is compellable to disclose the name of the person who has retained him; and that an attorney can be compelled to disclose communications made to him by a client, conveying information of an intent to commit fraud or crime.

On the whole the book is a valuable one, not only from the fact that it is new, and contains the latest cases, but that it presents the *law* in a compact form, and one eminently convenient for ready reference.

Q.

THE STATUTE RAILROAD LAWS OF NEW YORK, containing the General Railroad Law, the General Corporation Law, the Stock Corporation Law, the Statutory Construction Law, the Rapid Transit Act, the Condemnation Law, &c., with Numerous Citations, &c. By **GEORGE A. BENHAM**, of the Troy Bar. Albany, N. Y.: W. C. Little & Co. 1894.

One of the most striking evidences of the growth and development of our country is the number of books that has appeared of recent years, dealing with the laws peculiar to the larger and wealthier states. In the early years of the century, and, indeed, until a quite recent date, such works would have gone begging for a publisher, for they could only have commanded a very limited *clientele*. But now they are a necessity, since development along different and sometimes contradictory lines has rendered the law of one state often wholly inapplicable to another; and the accumulated mass renders a general work too bulky for handy reference.

In this volume, however, the author has not wholly confined himself to the law of his own state; he has also included the Interstate Commerce Act, and has referred to numerous decisions from other states, as well as from England, tending to explain the construction of the New York Statutes. This, of course, lends much additional value to the book, and redeems it from the accusation of mere provincialism, which might be successfully urged against some works of a similar scope, notably one published some years ago, that professed to treat of the subject of mandamus under the laws of the same state.

In scope and execution this book proves an excellent development of its author's idea, and compares very favorably with other works on the same lines, such as Weimer on Railroads, to quote the most recent example. Of course, its usefulness is limited by its scope to the state with whose laws it deals; but to the lawyers of that state it is indispensable.

R. D. S.

THE FEDERAL INCOME TAX EXPLAINED. By **JOHN M. GOULD** AND **GEORGE L. TUCKER**, Authors of "Notes on the United States Statutes." Boston: Little, Brown & Co. 1894.

Whatever may be the outcome of the present contest before

the Supreme Court over the constitutionality of the new Income Tax, this little book will be widely read. It is simply a clear and concise account of the construction put by the courts and by the Department of Internal Revenue upon the various clauses of the former Acts of this character, and a well drawn comparison between the provisions of the earlier laws and those of the Act of 1894, which, if it withstands the present assault upon its general constitutionality, will doubtless prove a fruitful field for future contests in which the interpretation of its separate clauses will figure.

The book is thoroughly well arranged in the form of an annotation, the decisions upon each point of the previous Acts being grouped under a brief statement of the point itself. The authors have wisely abstained from entering upon any discussion of the wisdom or folly, constitutionality or unconstitutionality of the law. They have merely offered, in a practical and convenient form, the data which every lawyer, in whose hands is placed a case, under this law, will refer to. The exhaustive index adds materially to the value of the book.

W.

LICENSE LAWS. ALL LICENSE LAWS RESTRICTING INTER-STATE COMMERCE ARE UNCONSTITUTIONAL. Chicago: J. A. SHEPARD, Publisher.

The defendant in the case of *City of Titusville, Pennsylvania, v. J. W. Brennan*, 153 U. S. 193, was an employé of the publisher of this little pamphlet, which contains a history of the case, and a copy of the decision of the court of last resort. Accompanying it is a leaflet in which are set forth what the author considers the steps advisable to be taken by "drummers" for their protection in case they are arrested for selling without a license when engaged in interstate commerce.

The Collector Publisher Company (Detroit) has issued two more of the excellent quizzers, or series of questions and answers, for students preparing for examination for admission to the bar, etc., No. 12, on Agency, and No. 13, on Partnership. Mr. WM. C. SPRAGUE is the author and compiler of these little books, and much credit is due his thoroughness in covering the ground of his subjects, and the order in which he has arranged the questions and answers. Quizzers on Blackstone, on Domestic Relations, Criminal Law, Torts, Real Property, Constitutional Law, Contracts, and on Negotiable Instruments, have already made their appearance, and others are to follow.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

APRIL, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR MARCH.

Edited by ARDEMUS STEWART.

The Supreme Court of Oklahoma, in *Brown v. Woods*, 39
Pac. Rep. 473. has lately held, that an attorney-at-law, who
Attorney.
Suspension.
Effect
has been suspended from the practice of law in
the district court of a county in which he has
been elected county attorney, is not eligible to
enter upon the performance of the duties of that office, so
long as the order of suspension remains in full force, and not
reversed.

A passenger who leaves a street car in obedience to an order
of a policeman called by the conductor to remove him, is not
restricted to damages for the trouble in being put
off the car, and the additional expense necessary
to complete his journey: *Laird v. Pittsburgh
Traction Co.*, (Supreme Court of Pennsylvania.)
Carriers.
Ejection
of Passenger.
Exemplary
Damages

31 Atl. Rep. 51.

Certiorari, Search Warrant A certiorari will not lie to review the action of a magistrate in issuing what is commonly known as a "search warrant." *State v. Springer*, (Supreme Court of New Jersey,) 31 Atl. Rep. 215.

Conflict of Laws, State and Federal Jurisdiction The Supreme Court of California has recently decided, that, since the jurisdiction of a state over crimes committed within its territory is general, and that of the United States is exceptional, depending upon the fact that it has purchased land, with the consent of the state legislature, for forts, arsenals, and other buildings, it is not necessary, in an indictment in the state courts, to negative the jurisdiction of the federal courts: *Pre. v. Collins*, 39 Pac. Rep. 16.

Constitutional Law, Test Principles In view of the free and easy way in which some courts are in the habit of playing with the constitutionality of statutes, it may be well to quote and commend the language of the Supreme Court of Michigan, apropos of this subject, in a recent case: "The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict. In case of doubt, every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of the act." *Rouse v. Donovan*, 62 N. W. Rep. 359.

Amendment to Constitution, Time of Taking Effect A constitutional amendment does not take effect before the canvass of the vote by which it is adopted: *City of Duluth v. Duluth St. Ry. Co.*, (Supreme Court of Minnesota,) 62 N. W. Rep. 267.

Obligation of Contracts The Supreme Court of Illinois has held, in *Ford v. Chicago Milk Shippers' Assn.*, 39 N. E. Rep. 651, that when an act declares certain combinations to control prices illegal, and provides that a purchaser of any articles from any individual or corporation doing business in violation of the act, shall not be liable for the price of that article, and may plead the act as a defense to a suit for the price, the latter provision is not unconstitutional, as impairing

the obligation of contracts, even when the contracts in question were made before the passage of the act, if the articles were supplied to the purchaser after its passage.

The Court of Appeals of New York has recently decided, in spite of the dissent of Judges PECKHAM, O'BRIEN and BART-LETT, that, though the legislature cannot, under the

Police Power

guise of the police power, enact measures which restrain the citizen in the free pursuit of a lawful occupation, yet an act, which forbids any person to exercise the calling of a master plumber without passing an examination before a board thereby created, is a valid exercise of the police power, since the work of plumbing is essential to the comfort and health of the inhabitants of cities; and that the act is not void (1) as restraining individuals from working as plumbers, since it applies only to master or employing plumbers; (2) Nor as creating a monopoly, though the act applies only to master or employing plumbers, and requires two of the five members of the board to be employing plumbers; (3) Nor because the board acts unfairly or oppressively in the examination of applicants, since it provides for the appointment of an impartial board: *Pro. ex rel. Nechanicus v. Warden of City Prison*, 39 N. E. Rep. 686; affirming 30 N. Y. Suppl. 1095.

Judge PECKHAM, in his dissenting opinion, very clearly proves the utter absurdity of the attempt of the majority to rest the validity of this law upon the fancied security that it affords the public against unsanitary plumbing, by pointing out the simple fact that it neither provides for an examination of the journeymen plumbers, who do the real work, nor requires any careful supervision of that work by the master plumber who employs them; and also indicates this very serious defect, that the act leaves the requirements of the examination wholly to the discretion of the examining board, who may make that examination either so easy as to defeat any possible benefit that may result, or so difficult as to shut out all applicants, and so secure to the master plumbers already licensed a practical monopoly of the business. This decision is a flagrant example of the abuse of the police power; and one that should have called forth a reproof rather than a com-

mendation from the court. If the present drift of judicial opinion on the extent of the police power continues, we may expect to have, in a few years, examinations for garbage collectors and for street cleaners, in order to provide for the proper protection of the public health; it being well known that negligence in these matters is the cause of a great deal of disease.

The Supreme Court of the same state has recently held, that an act providing that no person not vaccinated shall be admitted to any of the public schools of the ^{Compulsory} ^{Vaccination} state is constitutional: *In re Walters*, 32 N. Y. Suppl. 322.

In Pennsylvania, it has been held that the school board of a city has the right, by virtue of its discretionary powers, to exclude a pupil who will not submit to be vaccinated during a small-pox scare: *Duffield v. School District of Williamsport*, 29 Atl. Rep. 742.

An agreement by property owners and persons engaged in business in the immediate neighborhood of a post office, to pay the owners of the building in which it is ^{Contract,} ^{Public Policy} located a specified sum monthly for a certain time, in case the building is rented to the government for a nominal sum, in order to retain the post office in that locality, is founded on sufficient consideration, and is not void, as against public policy: *Fearnley v. De Mainville*, (Court of Appeals of Colorado,) 39 Pac. Rep. 73.

The Supreme Court of the United States has just decided one of the most vexed questions of criminal law,—that the power of the jury to judge of the law of the ^{Criminal Law,} ^{Functions of} ^{Court and Jury} case, as well as the facts. It held, in accord with the better reasoning, that the court, in criminal as well as in civil cases, is alone empowered to determine the law; and that therefore it may refuse to charge on degrees of homicide of which there is no evidence, and may state that, under the evidence, there must either be an acquittal, or a conviction of murder: *Sparf v. United States*, 15 Sup. Ct. Rep. 273.

But while the general proposition is unquestionably sound, ~~for~~ the palliator of crime, the application of it to this particular case may well be questioned. The ruling of the lower court comes perilously near to a ruling on the effect of the evidence; and there would therefore seem to be much reason for the dissent of Justices GRAY and SHIRAS. The dissenting opinion of the former is a very full and profound exposition of the history of the controversy on this point, and the reasons for the opinion contrary to that of the majority of the court; and is well worth careful study, even if it fails to convince.

In the opinion of the Supreme Court of South Carolina, a prosecuting officer may, on his own motion, present a bill to the grand jury, without presenting an affidavit charging the offence, if he deems it necessary for the public good; and his action in doing so will be disturbed only in case of abuse of discretion: *State v. Bowman*, 20 S. E. Rep. 1010.

When a prisoner, after pleading guilty, is allowed to go out of custody without bail, the court has no further jurisdiction over him, and cannot, at a subsequent term, order his rearrest, and pronounce sentence upon him: *Pro. v. Allen*, (Supreme Court of Illinois,) 39 N. E. Rep. 568.

In an action for the death of the plaintiff's son, on the ground that the plaintiff has been deprived of his son's support, the "Insurance Experience Life Tables" are admissible to show the probable duration of the plaintiff's life, though he is in poor health; the latter circumstance only affects the weight to be given them: *Galveston, H. & S. A. Ry. Co. v. Leonard*, 29 S. W. Rep. 955.

There is an article on the admissibility of life and mortality tables in evidence, in 36 Cent. L. J. 75, which contains most of the important cases decided up to that time; but it may not be amiss to cite the more recent decisions on this point.

Any standard life tables, properly identified, are admissible, in case of death or permanent injury, to show the probable duration of life of the deceased or injured person: *Richmond & Danville R. R. v. Garner*, 91 Ga. 27; S. C., 16 S. E. Rep.

110; *e. g.*, the Carlisle tables; *Louisville, N. O. & C. Ry. Co. v. Miller*, (Ind.) 37 N. E. Rep. 343; the American Mortality tables; *Richmond & Danville R. R. v. Hissong*, 97 Ala. 187; S. C., 13 So. Rep. 209; *Louisville & N. R. Co. v. Hurt*, (Ala.) 13 So. Rep. 130; *Greer v. Louisville & N. R. Co.*, (Ky.) 21 S. W. Rep. 649; or any life tables shown to be used by all life insurance companies as a basis for life insurance; *Gulf C. & S. F. Ry. Co. v. Smith*, (Tex.) 26 S. W. Rep. 644. They are admissible, even though the plaintiff is engaged in a more hazardous occupation than that with reference to which they were made up: *Birmingham Mineral R. R. Co. v. Wilmer*, 97 Ala. 165; S. C., 11 So. Rep. 886.

They are not conclusive in any case, but are merely evidence to go to the jury, and to be weighed as any other matter of evidence: *Mary Lee Coal & Ry. Co. v. Chambliss*, 97 Ala. 171; S. C., 11 So. Rep. 897; *City of Friend v. Ingersoll*, (Neb.) 58 N. W. Rep. 281; and therefore cannot alone form a rule as to the probable duration of life; *Morrison v. McAtee*, 23 Oreg. 530; S. C., 32 Pac. Rep. 400. Before they can be admitted, a foundation must be laid by proving the age of the person concerned, or by introducing evidence from which his age can be inferred or approximately arrived at by the jury: *Atlantic Consolidated St. Ry. Co. v. Branchamp*, (Ga.) 19 S. E. Rep. 24.

It has been held that the courts will take judicial notice of standard tables, such as the American Mortality tables: *Louisville & Nashville R. R. v. Mothershed*, 97 Ala. 261; S. C., 12 So. Rep. 714; which would of course dispense with the necessity of authenticating them.

Vice-Chancellor Pitney, of the Court of Chancery of New Jersey, has recently decided a novel and interesting case on the subject of easements. The owner of a house, with a yard attached, had placed a water pipe, leading from a driven well in the yard to a sink in the kitchen of the house, there ending in a pump, by which water could be and was habitually drawn from the well to the kitchen for domestic purposes. Both the well and the pipe were completely hidden from view. The vice-chancellor held, under

Easement

these circumstances, that the pipe formed an apparent and continuous easement, which would pass as appurtenant to the dwelling by a conveyance of the latter alone, the former owner of both still retaining the yard; and that the same result would follow a simultaneous conveyance of the house and yard by the owner to different persons, provided that the grantee of the house and well had notice of the existence of the connection between the well and the pump, and of the other conveyance, and that that conveyance was made with his consent: *Larsen v. Peterson*, 30 Atl. Rep. 1094.

In *State v. Allen*, 62 N. W. Rep. 35, the Supreme Court of Nebraska has decided, that under the Ballot Law of that State, (which is in this respect but little different from those of other states which have adopted the Australian Ballot System, or one of its modifications,) it is not the province of the secretary of state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention; and that therefore, when two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each. The Supreme Court of Colorado has gone a step farther, and holds that neither the secretary of state, nor the courts, have power to decide which of two rival conventions of a political party has the right to act for the party: *Pro. v. Dist. Ct. of Arapahoe County*, 31 Pac. Rep. 339.

The New York decisions (in the Supreme Court) are not quite uniform. It has been held, on the one hand, that when a minority faction of a party secedes, and organizes separately, the decision of the majority faction that certain persons were duly elected members at a caucus of the party is not conclusive, but reviewable by the court: *In re Breat*, 27 N. Y. Suppl. 176; S. C., 6 Misc. Rep. 445; but on the other, that a determination by the state convention of a party on a contest between two delegations, as to the regularity of the conven-

tions by which they were nominated, will be treated by the courts as conclusive: *In re Redmond*, 25 N. Y. Suppl. 381: S. C., 5 Misc. Rep. 369; even though contrary to a previous judicial determination of the same question: *In re Pollard*, 25 N. Y. Suppl. 385. The latter seems to be the true doctrine, as the decisions of a political convention, like those of any other tribunal of limited jurisdiction, ought to be conclusive on matters within its jurisdiction, unless there exist grounds for equitable relief, or express authority to interfere has been given to the courts of law by statute.

An inmate of a veterans' home, who intends to stay there as long as he lives, is a resident of the precinct in which the home is located, and qualified to vote as such, though he became an inmate of the home solely because of his indigent circumstances: *Stewart v.*

Kyser, (Supreme Court of California,) 39 Pac. Rep. 19.

But under the Constitution of Michigan, Art. 7, § 5. providing that no elector shall be deemed to have gained or lost a residence, "while kept at any almshouse or other asylum at public expense," a person who becomes an inmate of a soldiers' home gains no residence in the municipality where the home is located, whatever may be his intention in entering it: *Walcott v. Holcomb*, 97 Mich. 361; S. C., 56 N. W. Rep. 837; *Pro. v. Hanna*, 98 Mich. 515; S. C., 57 N. W. Rep. 738.

The question as to the right of a student at an educational institution to vote, there or elsewhere, has received a full exposition in, and may now, perhaps, be considered as finally settled, by the decision of the Supreme Court of Nebraska, in *Berry v. Wilcox*, 62 N. W. Rep. 249. In that case, the rulings were as follows: (1) The fact that one is a student at an educational institution of itself has no bearing upon his right to vote at that place; if his residence is there, he may vote there, if otherwise qualified: (2) A person's residence is where he has his established home, where he is habitually present, and to which he intends to return, whenever he departs therefrom; the fact that he may intend to definitely remove therefrom

Voters,
inmates of
Home

Voters,
Students

at some future time does not defeat his residence there, until he actually does remove; and it is not necessary that he should have the intention of always remaining, but he must not have an intention of presently removing: (3) Persons, otherwise qualified to vote, who come to an educational institution mainly for the sake of obtaining an education; who do not depend on their parents for support, do not intend to return to their parental home when their studies are completed, and are accustomed to leave the institution during vacation, going wherever they can find employment, and returning to the institution when the term opens; who regard the seat of the institution as their home, and have no fixed purpose as to their movements after completing their studies, are entitled to vote at the place where the institution is located.

As a rule, the residence of a student at an institution of learning remains, for purposes of voting, with his parents: *Fry's Appeal*, 71 Pa. 302; *In re Lower Merion Election*, 1 Chest. Co. Rep. (Pa.) 257. But, in the absence of statutory regulations, a student who leaves his home to go to college, and definitely abandons his home, may gain a residence at the college: *In re Ward*, 20 N. Y. Suppl. 606; S. C., 29 Abb. N. C. 187; *In re Lower Oxford Contested Election*, 11 Phila. 64; S. C., 1 Chest. Co. Rep. (Pa.) 253. So, a student who went to college, and stayed there for seven years, acting during vacations as waiter at different summer resorts, supporting himself by his own efforts, and only making brief visits to his former home, will be held to have acquired a residence at the college: *Shaeffer v. Gilbert*, 73 Md. 66; S. C., 20 Atl. Rep. 434. The burden of proof, however, to establish change of residence, rests in any case upon the student claiming to vote by reason thereof: *In re Lower Oxford Contested Election*, 11 Phila. 64; S. C., 1 Chest. Co. Rep. (Pa.) 253.

But under the present Constitution of New York, Art. 2, § 3, providing that no person shall be deemed to have gained a residence, for purposes of voting, while a student in any seminary of learning, it is immaterial that a student has no other domicile than the seminary: *Goodman v. Bainton*,

(Supreme Court of New York,) 31 N. Y. Suppl. 1043. This, however, is an extreme case, and would hardly seem to be within the reasonable intendment of the constitution.

The Supreme Court of Minnesota has proved its ability, by being almost the only court to give a liberal interpretation to the provisions of the Australian Ballot Laws for marking ballots. That court has held, in *Pennington v. Harr*, 62 N. W. Rep. 116, that though those provisions are mandatory, yet any mark, however crude and imperfect in form, if it is apparent that it was honestly intended as a cross-mark, and for nothing else, must be given effect as such; *otherwise electors unaccustomed to the use of pen or pencil might be disfranchised*. It also ruled, that a ballot marked with the name of the voter could not be counted, as it came within the prohibition of the use of a distinguishing mark; but Collins, J., in a very able dissenting opinion, urges the validity of such ballots with almost convincing force.

A witness may testify to a confession which he swears was made by the accused to a third person in the dark, although the witness states that he did not see the accused, but only knew him by his voice; the testimony is admissible, its value being a question for the jury: *Fussell v. State*, (Supreme Court of Georgia,) 21 S. E. Rep. 97.

A person who overhears a conversation between an attorney and his client, and who stands in no confidential relation to either, may testify to the conversation: *People v. Buchanan*, (Court of Appeals of New York,) 39 N. E. Rep. 846.

According to the Supreme Court of the United States, the reading in evidence on the second trial of a cause of a transcribed copy of the reporter's stenographic notes of the testimony of a witness for the prosecution who has died since the first trial, is not an infringement of the constitutional provision that the accused shall be confronted with the witnesses against him: *Mattar v. United States*, 15 Sup. Ct. Rep. 337.

The Court of Appeals of New York has administered a

deserved rebuke to the absurd lengths to which expert evidence is now carried, though in terms much milder than the case warranted. On the trial of the notorious Dr. Buchanan, for the murder of his wife, one of the jurors, while at dinner at a hotel, after the case had been submitted to the jury, was suddenly taken ill, and fainted. Physicians, expert in mental diseases, examined the juror, and gave it as their opinion that he was not affected with epilepsy or paresis; and that his symptoms resembled those of nervous exhaustion, due to his close confinement as a juror. The juror himself denied ever having suffered from epileptic attacks; and physicians who had known and attended him testified that he had never manifested any symptoms of nervous disease. And yet other physicians were found, total strangers, who had no knowledge of the facts other than that gained from the statements of others, who dared to testify that, in their opinion, the attack was of an epileptic character, and indicated a mental disturbance that must have existed for several hours, and have rendered his mental action unreliable and useless. This testimony was very properly held not to show that the juror was mentally incapable of concurring in the verdict, and therefore not good ground for setting it aside: *Pro. v. Buchanan*, 39 N. E. Rep. 846. This case, in common with many other recent ones, goes to show how utterly unreliable the testimony of the average expert is, especially when he has a pecuniary stake in the question at issue.

The incumbent of an office, which it was attempted to create by an unconstitutional statute, cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer: *Kibby v. State*, (Supreme Court of New Jersey,) 31 Atl. Rep. 213.

The Supreme Court of Georgia has lately held, that the rule of the road, which requires travelers with vehicles, when meeting, to each turn to the right, exists for the benefit of travelers only, and not for the behoof of one who has wrongfully caused a bad condition of the road or street. One may, from motives of

courtesy, or for other reasons, waive his right to have another observe this rule, but is not bound to do so; and the fact that he does waive it, and in so doing drives into a dangerous place in the highway, and is thereby injured, affords no excuse to a wrongdoer who caused the dangerous place to exist, and will not prevent a recovery against such wrongdoer by the person so injured, if the latter is free from negligence, and otherwise entitled to recover: *Atlanta St. Ry. Co. v. Walker*, 21 S. E. Rep. 48.

The rule of the road has been adopted by statute in most, if not all, of the states of the Union; but it is not an absolute requirement, which must be obeyed at all hazards. It only applies to vehicles meeting and passing each other, and others are not required to observe it: *Johnson v. Small*, 5 B. Mon. (Ky.) 25; *Brooks v. Hart*, 14 N. H. 307; *Parker v. Adams*, 2 Metc. (Mass.) 418. There are even exceptions to its observance in the case of vehicles meeting and passing each other; *e. g.*, it is the duty of a light vehicle to give place to a much heavier and more unwieldy one: *Grier v. Sampson*, 27 Pa. 183. Accordingly, the mere fact that a driver meeting another vehicle turns to the left instead of to the right, is no bar to a recovery for damages occasioned by a defect in the highway: *Grier v. Sampson*, *supra*; *O'Neil v. Town of East Windsor*, 63 Conn. 150; S. C., 27 Atl. Rep. 237; nor even to a recovery for damages caused by a collision with the other vehicle: *Riepe v. Elting*, (Iowa,) 56 N. W. Rep. 285. It is not contributory negligence to turn to the left, in the hope of allowing another, driving on the same side of the road, to pass: *Schiuff v. Sliter*, 64 Hun. (N. Y.) 463. It is a sufficient excuse for leading a horse on the left side of the street, that the right side was crowded with cars, trucks, and other vehicles: *Mooney v. Trow Directory, Printing & Bookbinding Co.*, 21 N. Y. Suppl. 957; S. C., 2 Misc. Rep. 238; and the fact that one is found on the wrong side of the road is not conclusive evidence of fault: *Randolph v. O'Riordan*, 155 Mass. 331.

The rule of the road was never meant to apply to a highway formed by the junction of two streets crossing each other

diagonally: *Norris v. Saxton*, 158 Mass. 46; S. C., 32 N. E. Rep. 954. Where it does apply, however, it requires a driver meeting another to keep to the right of the centre of the *worked* part of the road, not to the right of the centre of the smooth or traveled part: *Earing v. Lausink*, 7 Wend. (N. Y.) 185.

The Court of Appeals of Kentucky, in *Commonwealth v. Delaney*, 29 S. W. Rep. 616, has ruled, that when a person is kidnapped, his friends may undertake his rescue, and in case of resistance, may use such force as will be necessary to accomplish the rescue; and if the kidnappers attack them, and one of their number, in defending himself, shoots and kills any one, without intending to do so, the homicide is excusable. This is a reassertion of the rule laid down on the first hearing of this case in error: 25 S. W. Rep. 830.

The Supreme Court of Indiana has lately held, in *Stroup v. Stroup*, 39 N. E. Rep. 864, that when a husband, intending to defeat his wife's dower, has land purchased by him conveyed to another, but secures the full use and disposition thereof to himself, the wife, as the conveyance is in fraud of her, may, *either before or after* the husband's death, recover that part of the land which would have fallen to her as dower, had her husband been actually seised; and further, that when a husband purchases land, and causes it to be conveyed to another in trust for himself, reserving a life estate in it, and retaining a power of disposition over it to his own use, he has an equitable interest therein, to which dower may attach.

Riparian owners on navigable streams have no title to the ice which forms on such streams, as an incident to their ownership of the bank; and if a statute gives them title to the ice opposite their property, and prescribes a remedy for invasion of their rights therein, that remedy is exclusive: *Briggs v. Knickerbocker Ice Co.*, (Supreme Court of New York,) 32 N. Y. Suppl. 95. There

is an annotation on the subject of property in ice, in 32 AM. L. REG. & REV. 166.

The Supreme Court of the United States, in *Emert v. State of Missouri*, 15 Sup. Ct. Rep. 367, has recently decided, that a state law prohibiting peddlers, who deal in selling goods by going from place to place to sell the same, from peddling without a license, which must state how the dealing is to be carried on, and must also be exhibited on demand to any sheriff, collector, constable, or citizen householder of the county, is not an invasion of the power of Congress to regulate interstate commerce, as applied to one who, as agent of a manufacturer in another state, in this way sells and delivers sewing machines which he has with him at the time of soliciting purchases: affirming *State v. Emert*, 103 Mo. 241; S. C., 15 S. W. Rep. 81.

This is a material qualification of the rule announced in *Brennan v. Titusville*, 153 U. S. 289, that a state cannot impose a license tax on agents soliciting orders for goods manufactured out of the state; and shows an appreciation of the difficulties which a strict adherence to that doctrine was bound to cause. It is a promise of better things to come.

A judgment entered in pursuance of a warrant of attorney, in a state in which such judgments are authorized, has the same force, when sued on in another state, as a judgment in adversary proceedings; an action thereon can only be defeated by want of jurisdiction in the court, by fraud in procuring the judgment, or by defences based on matters arising after the judgment was rendered; such defences as payment before judgment, the bar of the statute of limitations to the foreign judgment, or any other defence which applies to the original cause of action, are conclusively negated by the judgment; but the sufficiency of the warrant to authorize the judgment may be inquired into, and is to be determined from the evidence of the laws of the state of its entry: *Snyder v. Critchfield*, (Supreme Court of Nebraska), 62 N. W. Rep. 306.

A defendant who joins with the jurors in drinking at the

plaintiff's expense, and who gives the court no notice of the occurrence until after the verdict is rendered, cannot urge, on a motion to set aside the verdict, that the jurors were influenced in plaintiff's favor by the gift of the liquor: *Bradshaw v. Degruhart*, (Supreme Court of Montana,) 39 Pac. Rep. 90.

Jury,
Improper
Influence

When the jury, during the progress of a trial for murder, read newspaper accounts of the proceedings, which report them correctly, and contain nothing of an unfair or prejudicial nature, they are not guilty of such misconduct as to require the granting of a new trial: *Pro. v. Leary*, (Supreme Court of California,) 39 Pac. Rep. 24.

Misconduct,
Reading
Newspapers

The same court holds, in accord with the general rule, that affidavits of jurors that they had read newspaper reports of the cause they were trying, during its progress, are not admissible to impeach their verdict: *Pro. v. Acoff*, 39 Pac. Rep. 59. See 1 AM. L. RAO. & REV. (N. S.) 877.

Impeaching
Verdict

As the affidavits of the jurors themselves are incompetent to impeach their verdict, affidavits made by others, which purport to contain statements made by jurors, during alleged conversations with them after the trial of the case was closed, and they had been discharged, in reference to matters which occurred in the jury room during the deliberations of the jurors, are also incompetent, as resting on the mere statements of the jurors themselves: *Peterson v. Skjeltorp*, (Supreme Court of Nebraska,) 62 N. W. Rep. 43.

To the same effect is *State v. Schaefer*, (Mo.,) 22 S. W. Rep. 447.

Malicious
Prosecution,
Liability of
Instigator

It is no defence to an action for malicious prosecution, that the complaint was sworn to by the chief of police, when he was induced to do so by the defendant, and acted, in doing so, on information furnished by the defendant: *Tangney v. Sullivan*, (Supreme Judicial Court of Massachusetts,) 39 N. E. Rep. 799.

The mayor of a city is not liable to an action of malicious

prosecution, for causing the arrest of a person under a city ordinance subsequently declared invalid, when he acted in good faith, though at the time of the arrest he had some doubts as to the validity of the ordinance, and its enforcement rested exclusively with the board of public works, which had refused to enforce it, because they believed it to be invalid: *Goodwin v. Guild*, (Supreme Court of Tennessee,) 39 S. W. Rep. 721. See 1 AM. L. REG. & REV. (N. S.) 591, 865; 2 AM. L. REG. & REV. (N. S.) 23, 94.

Prosecution by Mayor under void Ordinance
 A railroad company is not liable for the act of a brakeman, who pushes a trespasser from one of its trains, because the Master and Servant, trespasser will not pay for the privilege of riding, the money not being demanded as fare, and the brakeman having no authority to collect fares; such an act is not within the scope of his duty: *Illinois Cent. R. Co. v. Latham*, (Supreme Court of Mississippi,) 16 So. Rep. 757.

Master and Servant, Railroads, Liability for Acts of Employee
 Judge Dallas, of the Circuit Court for the Eastern District of Pennsylvania, has recently rendered a decision on a novel point of law, in *Platt v. Phila. & Reading R. R. Co.*, 65 Fed. Rep. 660. The railroad company had, in 1887, adopted a rule that no one would be employed by it who was a member of a labor organization, unless he would agree to withdraw therefrom; and from that time required every applicant for employment to sign an application, representing that he was not a member of any such organization, or that, if he was, he would withdraw therefrom. Some years after, receivers were appointed for the company, who continued the same rule and practice; and issued a notice, stating that it was their intention to discharge any employees who were members of labor organizations, unless they severed their connection with them before a certain date. Certain of the employees of the receivers thereupon petitioned the court to restrain the receivers from acting upon this notice. It appeared that all the petitioners had either obtained employment by cancelling their membership in labor

Trade Unions, Membership Forbidden

organizations, or had had notice of the rule, and had been employed, in violation of it, by subordinate agents, without the knowledge or consent of the receivers; and no others, differently situated, asked to be made parties. The court accordingly held that the petitioners, who had thus violated a known rule, had no standing whatever to seek to restrain its enforcement; and that, in any case, the court would not direct the receivers to abrogate a rule, established by the owners of the property, and believed by them, and also by the receivers, to be advantageous in its management, inasmuch as it involved nothing unlawful.

This decision is so plainly correct that it needs no commendation; but one may be pardoned for commenting upon the impudence of such a claim, made by men whose avowed purpose is to prevent their employers from employing any one who does not belong to their organizations. They seem to be wholly ignorant of the maxim that he who seeks equity must do equity.

~~The~~ Supreme Court of Georgia has rejected the indefensible ~~no~~ imputed negligence declared in *Pridcaux v. Mineral Point*, 43 Wis. 513, and has decided, in *Roach v. Western & A. R. Co.*, 21 S. E. Rep. 67, that the negligence of the driver and owner of a private vehicle, who, by that negligence, contributes to a collision with a locomotive, is not imputable to another person riding in the vehicle by invitation, unless that person had some right or was under some duty to control or influence the driver's conduct; e. g., such a right as might arise from their being engaged in a joint enterprise for their common benefit; or such a duty as might arise from the known or obvious incompetency of the driver, resulting, for instance, from drunkenness, or other cause.

That court had already decided, in *East Tenn., Va. & Ga. R. Co. v. Markus*, 88 Ga. 60; S. C., 13 S. E. Rep. 855, that a passenger in a public hack is under no duty to supervise the actions of the driver at a public crossing, nor to look for approaching trains, unless she has some reason to distrust the

driver's diligence in regard to such matters; and had prescribed the limits of the imputation of the custodian of a minor child to its parents, in *Atlanta & Air-Line Ry. Co. v. Gravit*, 20 S. E. Rep. 550; 2 AM. L. REG. & REV. (N. S.) 97.

Public Contracts, Injunction
 An injunction will not lie to restrain a school board from awarding a contract to one who is not the lowest bidder, when the board reserved the right to reject any and all bids, where there is no evidence of fraud on the part of the bidder, and where there is no statute requiring contracts to be awarded to the lowest bidder: *Chandler v. Board of Education of City of Detroit*, (Supreme Court of Michigan,) 62 N. W. Rep. 370.

A taxpayer may enjoin a void contract: *Berbe v. Board of Supervisors of Sullivan Co.*, 64 Hun. (N. Y.) 377; *Wormington v. Pierce*, 22 Oreg. 606. But one company cannot enjoin another company and the board of commissioners appointed to let public contracts for the state from proceeding under a contract to bind state documents, awarded by the said board to the latter company, though that company has failed to give bond as required by law, and though its bid was not so low as that of the complainant, if the suit is not brought on behalf of the state or as a taxpayer; such contracts, and the provisions of the statute prescribing the manner of letting them, being intended to protect the public interests, and not those of individuals, as such: *Arkansas Democrat Co. v. Press Printing Co.*, (Ark.,) 21 S. W. Rep. 586.

Public Officer, Railroad Passes
 A notary public is a public officer, within the meaning of a constitutional provision that any public officer who shall travel on a free pass shall forfeit his office: *Pro. v. Rathbone*, (Supreme Court of New York,) 32 N. Y. Suppl. 108.

Quo Warranto, Fines
 When a public office is intruded into, without color of right, the court, on *quo warranto*, will impose such a fine upon the usurper, as appears, under the circumstances of the case, to be proper: *State v. Davis*, (Supreme Court of New Jersey,) 31 Atl. Rep. 218.

The Supreme Court of Nebraska, in *Chicago, Burlington & Quincy R. R. Co. v. Bell*, 62 N. W. Rep. 314, has given

Release and
Discharge,
Railroad
Relief
Association

a clear exposition of the legal status of a railroad relief department, and the binding effect of the contract by which an employe, receiving aid from the department, agrees to release all claims against

the company for injuries. It holds: (1) That in the absence of all evidence on the subject, it cannot be presumed that the establishment and operation of such a department is an act *ultra vires*; (2) That the contract aforesaid does not lack consideration; (3) That the promise made by the employe to the relief department for the benefit of the railroad company is available to the latter, either as a cause of action, or as a defence; (4) That such a contract is not against public policy; (5) That the effect of the contract is not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or its servants; (6) That the employe does not, by such a contract, waive his right of action against the railroad company for injuries due to its negligence; (7) That it is not the execution of the contract that estops the employe from recovering for injuries due to the negligence of the company, but his acceptance of moneys from the relief department on account of such injuries, after his cause of action against the company has accrued; and that therefore, (8) When an employe of the railroad, who is also a member of the relief department, has been injured through the negligence of the company, and has received money from the funds of the relief department, on account of the injury, he cannot recover from the company, in an action for damages for that injury, in the absence of proof that he was induced to become a member of the relief department, or to execute the contract and release, or to accept the money paid him by the relief department, through fraud or mistake.

This is in full accord with the almost unanimous current of decision. In every reported case, except one, the courts have held the agreement to release the company on receiving benefits from the relief department good, because it does not absolutely deprive the employe of his right of action against

the company, but merely puts him to an election between a suit for damages and the acceptance of benefits: *Owens v. B. & O. R. R.*, 35 Fed. Rep. 715; *Johnson v. P. & R. R. R.*, (Pa.) 29 Atl. Rep. 854, affirming 2 D. R. (Pa.) 229. This distinguishes such a release from an absolute undertaking to release the employer from all liability as a condition of being received into service. The latter has always been held invalid: *Roesner v. Hermann*, 8 Fed. Rep. 782; *Kans. Pac. Ry. Co. v. Penney*, 29 Kans. 169; *Lake Shore & M. S. Ry. Co. v. Spangler*, 44 Ohio St. 471. Such a contract, also, is not bad for want of mutuality, when the company is a member of the association, and a party to the contract by which the employe becomes a member: *Leas v. Penna. Co.*, (Ind.) 37 N. E. Rep. 423.

The question of consideration is a more serious one. It is not so apparent at first sight that any consideration moves from the company; but an investigation of the affairs of such associations will almost always show that the company is itself a contributor to the funds of the department, guarantees any deficit that may happen, and pays the running expenses. This is of course a valuable consideration; and can hardly be said to be insufficient. For instance, the Reading Railroad contributed \$100,000 to its relief department at its formation; the Baltimore & Ohio contributed the same; and the Chicago, Burlington & Quincy had, at the time of the Bell suit, contributed over \$110,000 to its relief department. These sums certainly bore a fair proportion to the contributions of the members of the association.

There is one serious objection, however, to the validity of such a release, in certain cases. Where membership is voluntary, as in the C., B. & Q. and Pennsylvania Company departments, there can be no question of the binding force of the contract. The contract is mutual, and rests on a valuable consideration, as has been shown; and the employe contracts as a free agent. But when membership is compulsory, as in the Reading, B. & O., and London & Northwestern relief departments, it can hardly be claimed that the employe is wholly free to make his choice. It is true that he is not bound to

release the company. He may sue it; but then he loses the contributions which he has been forced to pay into the relief department. It is not a sufficient answer to this that he is not bound to accept employment on the railroad. The company has no right to require such a contract of him. It is an unconscionable one, and one that the courts ought not to enforce. And still less is it an answer to say, *without assigning reasons for it*, that the contract is for the advantage of the employe, as has been said in *Johnson v. P. & R. R. R.*, (Pa.) 29 Atl. Rep. 854, and by the Court of Appeal of England, of whom one would expect better things, in *Clements v. London & N. W. Ry. Co.*, [1894] 2 Q. B. 482. In such a case, (though not in that,) the criticism of Halliott, J., in *Miller v. C., B. & Q. R. R.*, 65 Fed. Rep. 305, applies with full force: "Having paid for benefits, on what principle can he be required to renounce them?" This distinction, however, has been overlooked by the courts, and it has even been held that an infant, entering the employ of a railroad which made membership in the relief association a condition of service, was bound by the contract of release: *Clements v. London & N. W. Ry. Co.*, [1894] 2 Q. B. 482.

One case is opposed to this consensus of opinion: *Miller v. C., B. & Q. R. R.*, 65 Fed. Rep. 305. But this, though strongly argued by the judge, was a case of voluntary membership, and therefore the release would, in the absence of fraud or mistake, be unquestionably valid.

But while it seems to be settled, for the present at least, that the employe himself will be bound by the release, in case he elects to receive benefits from the relief association, it does not bar the rights of others to recover for injuries to the employe; and therefore the widow and children are not debarred from action against the company, unless they have executed individual releases. Even if the widow has accepted benefits and given a release, she will not be barred from bringing an action as administratrix on behalf of her children: *C., B. & Q. R. R. v. Wymore*, 40 Neb. 645; S. C., 58 N. W. Rep. 1120. But if a widow releases her right of action in order to enable the mother of the employe, who was designated as

to recover benefits, she will be barred thereby: *State v. B. & O. R. R.*, 36 Fed. Rep. 655; and it has been held that if the wife and child recover damages, the mother cannot recover benefits: *Fuller v. B. & O. Employers' Relief Assn.*, 67 Md. 433; S. C., 10 Atl. Rep. 237. This, however, is rank injustice. The two claims rest on a different footing. Neither is bound by the release in the contract of membership; and their rights are entirely distinct, neither depending in the slightest degree on the other. The ruling is indefensible.

Finally, there may be a distinction between cases where the release is only found in the contract of membership in the relief association, and those in which the prudence of the company exacts a new release on the acceptance of benefits: *Martin v. B. & O. R. R.*, 41 Fed. Rep. 125; *Graft v. B. & O. R. R.*, (Pa.), 8 Atl. Rep. 206; *Spitze v. B. & O. R. R.*, 75 Md. 162; S. C., 23 Atl. Rep. 307. This, however, is doubtful. If the contract is good in the first instance, the second release is superfluous; if it is bad, the requirement of a new release as a condition of receiving benefits is but an act of coercion, and an attempt to evade liability, which should not be countenanced.

Even if the release of the railroad is good, it is doubtful whether the provision that no benefits shall be paid if the company is sued, is valid. That contract seems to be wholly without consideration. The employe, in case he sues the company, forfeits all contributions, and the relief association receives the benefit of them, without the slightest return.

The Supreme Court of New Jersey has lately held, that the judgment of the state superintendent of schools is as conclusive on the matters over which authority is given him to decide, as the judgment of a legally created court of limited jurisdiction, acting within the bounds of its authority, would be; and therefore a teacher, who has successfully litigated before the state superintendent the disputed questions on which her right to compensation depends, is entitled to a writ of mandamus to enforce a decision in her favor; and in such a case it is only necessary for the relator to show that the state

Schools.
Decision of
State Super-
intendent,
Mandamus to
Enforce

superintendent had jurisdiction of the matter in dispute, and over the parties to the controversy: *Thompson v. Board of Education of Borough of Elmer*, 31 Atl. Rep. 168.

The Supreme Court of the United States, though technically deciding it, has yet left the Income Tax question in a state of uncertainty by a division of opinion, Justices HARLAN, BROWN, SHIRAS and WHITE being in favor of the constitutionality of the law, and Chief Justice FULLER and Justices FIELD, GRAY and BREWER holding it unconstitutional. This, of course, means a reargument of the points in dispute as soon as Mr. Justice JACKSON is able to sit. The rulings, in brief, were these: The court decided, against the dissent of Justices HARLAN and WHITE, (1) That so much of the act as attempted to impose a tax upon the rental or income of real estate, as such taxes are direct taxes, is unconstitutional; and (2) That so much of the act as attempted to levy a tax on municipal lands is unconstitutional. But the Justices were divided on the following questions: (1) Whether the void provisions as to rents and income from real estate invalidate the whole act; (2) Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes; (3) Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested. It is to be hoped that we may soon have a final decision of these questions.

According to a recent decision of the Court of Civil Appeals of Texas, when a telegram is sent to an address outside of the telegraph company's free-delivery limits, but without notifying the sender that the address is outside of those limits, and the agent at the receiving office has been for years in the habit of sending messages outside such limits by hackmen and others, without extra charge, and undertakes to do the same with the telegram in question, the company is liable for the delay of the person who undertakes to deliver the telegram, though the form in which it is sent exempts the company from

Telegram.
Delivery.
Delay

liability for delay in delivering the message outside its free-delivery limits: *Western Union Tel. Co. v. Homack*, 29 S. W. Rep. 932.

When, at the opening of a term of court, the judge has the court house clock set by true sun time, given by a sun-dial,

**Time,
Computation**

and the sessions of the court are held according to that clock, the hour at which the term expires will be fixed by the true sun time, and not by what is known as "standard" time: *Parker v. Stah*, 29 S. W. Rep. 480.

The presumption always is that common time is meant. If the return of a summons issued by a justice of the peace is to be made according to standard time, the summons should so state, or it will be presumed that it was to be returned according to common time: *Scudles v. Averhoff*, 26 Neb. 668; S. C., 44 N. W. Rep. 872. In Georgia, the only time recognized by law is common time, based on the meridian; and standard time cannot be substituted at will for that recognized by law: *Henderson v. Reynolds*, 84 Ga. 159; S. C., 10 S. E. Rep. 734.

Trees growing in a city street are under the control of the city, and it may have them cut down, to make room for a sidewalk, even though the fee of the street does not belong to the city: *City of Mt. Carmel v. State*, (Supreme Court of Illinois,) 39 N. E. Rep. 584.

The House of Lords has recently decided, that the owner of land overhung by trees growing on his neighbor's land is entitled, without notice, to cut the branches so far as they overhang, provided that he does not trespass on his neighbor's land; even though they have so overhung for more than twenty years: *Lemmon v. Webb*, [1894] App. Cas. 1; affirming [1894] 3 Ch. 1. See 1 Am. L. Reg. & Rev. (N. S.) 822.

When a witness to a will is unable to write, and his signature is written, at his request, by another person, but the witness neither touches the pen nor the hand of the person who does the writing, the subscription is invalid: *McFarland v. Bush*, (Supreme Court of Tennessee,) 29 S. W. Rep. 899.

**Will,
Witness,
Signature**

The Supreme Court of Arkansas, following the weight of authority, has recently held, that, in the absence of express

Witness.
Fees.
Expert

statutory authority, an expert who testifies for the state in a criminal case cannot demand extra compensation as an expert, in addition to the usual witness fees, at least when he is not compelled to make any preliminary examination or preparation, and is not compelled to attend and listen to the testimony: *Flinn v. Prairie Co.*, 29 S. W. Rep. 459.

When no demand is made in advance for special compensation, an expert witness can recover only the statutory witness fees: *Board of Commissioners of Larimer Co. v. Lee*, 3 Colo. App. 177; S. C., 32 Pac. Rep. 841.

HOMELY ADVICE.—BEING A BRIEF DISCUSSION OF HOW TO RIDE IN A RAILWAY TRAIN.

By CHESTER N. FARR, JR.

We offer no excuse for the writing of this article. Had the intricacies of railroad accident law been developed to their present extent at the time Poor Richard wrote his almanac, he would have infallibly produced a chapter somewhat similar to this of ours. We intend ultimately to publish it as a "Hand-buch" for tourists, so that it may become a familiar and indispensable accompaniment of a traveler's kit. The world has long stood in need of an article of this character, and it is with a feeling of pardonable pride that we offer this one to the world aforesaid.

The advantages of the article are obvious. You, for example, reader, meet with what is popularly called an accident on a railway train. You are injured, your business falls in arrears, your physician becomes a too frequent visitor, you are boiling with indignation against the company. You sue for damages and indulge the pleasing expectancy of just retribution. But, my dear friend, you have failed to recognize that there is, in the eye of the law, a monstrosity known as "the ordinary man, exercising reasonable care, under the circumstances." You have failed to conduct yourself with that prudent nicety which this gentleman would have exercised under like conditions. You are nonsuited or a verdict is directed against you. Had you but read this article you might have recovered substantial damages to pay for your business neglected, your body permanently injured and your physician's bills. It is the high function of this essay to inform you as to what you should do when you ride on a railway train.

Imprimis: Let us see how one should board a train. But eh? Is it possible that you are sneering, reader? And what

is that you say? Any ass can do that? Now, faith, this is a display of the most cardinal lack of information on your part. *Crassa Ignorantia*, we may call it, and "ignorance of the law," according to a maxim somewhat well thumbed in legal fingers, and a trifle out at the elbows, "excuseth no one." For, in sooth, there is no more complicated problem in all human action than this same conduct of one's self in boarding a railroad train, unless, perchance, it be alighting from the same.

This is such a progressive country that loafing habits of any description whatsoever are intolerable. Most individuals are presumed to know how to conduct themselves in a railway station within the limits of becoming decency—but in the eyes of the law—in its eyes, beware reader, lest you loiter in the ticket office to speak to a friend after having purchased your ticket: *R. R. Co. v. Fox*, 6 S. W. Rep. 569. For you must pass quickly to the platform, keeping a sharp lookout for mail bag piles, and so on, which the care of the company may have placed in your path: *Ayres v. R. R. Co.*, 77 Hun. 414. Perhaps these may be negligently placed, but that is not for you to determine. Having reached a small station at an unreasonable night hour to wait for a train, take good care to seek a spot of safety and remain there: *Grimes v. R. R. Co.*, 36 Fed. Rep. 72. Are you cold and need exercise? The court has been pleased to permit this, but be most cautious in its conduct; the passage between Scylla and Charybdis or the Valley of the Shadow of Death is not more difficult. Call loudly for "light," even though you know the station agent is slumbering peacefully several parasangs in the distance: *Wood v. R. R. Co.*, 13 So. Rep. 555. For once, having called so loudly, you may walk gracefully into any obstruction you choose in the darkness, and recover handsome damages for injuries consequent thereon.

Take especial pains to regulate your conduct with propriety as another train draws into the station. Do not stand on the planking between the tracks, no matter how alluringly convenient it may seem: *McGehean v. R. R. Co.*, 149 Pa. 188.) When standing on a narrow space in front of a raised bag-

gage platform remain perfectly calm and flat as a train moves rapidly by you. It usually gives you a margin of at least six inches. You may think the margin a minus quantity, but should you attempt to gain any special "coin of vantage" and be struck while so doing, only the railroad company will forgive you: *Matthews v. R. R. Co.*, 148 Pa. 491.

The railroad company is not responsible for the subsequent career of mutilated bodies thrown indiscriminately around by the action of the train. Practice in rapid dodging is considered an exercise of reasonable care, and when Mr. Wood, a respected citizen of Philadelphia, was struck by a flying corpse while standing on a station platform, the courts declined to consider his case: *Wood v. Pa. R. R. Co.*, 4 Dist. Rep. 119.

On entering a car rush instantly for a seat, do not stand leisurely looking to see which pretty girl you are going to seat yourself beside. This is not a time for the inspection of female loveliness. Take a seat, *p. d. q.*, (N. B. This is not verbatim from the opinion): *De Soucey v. R. R. Co.*, 15 N. Y. S. 108. The courts are graciously pleased to permit a passenger to sit next the stove on a cold day. If you are thrown into it by a sudden jerk of the train, as Mr. Stewart, of Texas, was, you may recover. This is gratifying: *R. R. Co. v. Stewart*, 1 Tex. Civ. App.

Pointing out scenery to an admiring friend while seated at a car window or endeavoring to pull down telegraph poles or station posts with your hand as they are passed, is not an exercise of due care: *Quinn v. R. R. Co.*, 7 S. E. Rep. 614. The platform of a car is not the proper place for a passenger: *Tomr v. R. R. Co.*, 18 N. E. Rep. 213. The fact that you are going to a football match or prize fight and could not get in the car, even were you as thin as tissue paper, affords no excuse in the omniscience of the law: *Worthington v. R. R. Co.*, 64 Vt. 107; and, if, being a modest man, you have just offered your seat to a lady, and desire to conceal your blushes on the back platform, we are afraid that your only alternative is the toilet room. You may enjoy the society of the baggage agent, but it is negligence, *per se*, to talk to him: *R. R. Co. v. Langdon*, 92 Pa. 21. Nothing, not even a cinder

in your eye which only the baggage agent can extract, justifies your presence in the baggage car.

Riding on the cupola of a caboose car, though an exalted attitude, is not one of due care. Mr. Tuley, of Missouri, thought otherwise. He did not recover: *Tuley v. R. R. Co.*, 41 Mo. App. 432. Similarly a position on the coping of an engine tender or the sheet iron covering of the steps of an elevated railroad car, while they may afford unsurpassed opportunities for viewing scenery, are held to be objectionable actions by the courts: *Carroll v. R. R. Co.*, 17 S. W. Rep. 889; *R. R. Co. v. Riley*, 40 Ill. App. 416.

Do not, in your innocence, seat yourself on the arm of a car seat to converse with a friend. The railroad company is not responsible for your safety under such conditions. While this post offers excellent advantages for whispering soft nothings into the ears of Venus, the railroad company is not legally expected to afford facilities for love-making, and such action may be regarded as negligence, *per se*: *Wallace v. R. R. Co.*, 4 S. E. Rep. 503. As a matter of safety, it is probably better to rush swiftly to a seat, and plank yourself solidly upon it, for though courts have passed no opinion upon one who rides on the truck of a passenger car or the top of a locomotive smoke-stack, certain well-informed individuals have shrewdly inferred that they might regard proceedings of this nature, in the light of mild contributory negligence.

The law has a strong opposition to idle curiosity, and if the train by chance should stop, be thoroughly convinced in your own mind that the point of stoppage is a station ere you alight. A water tank or switch house will not suffice: *Wandell v. Corbin*, 1 N. Y. S. 795. Having once securely seated yourself, take good care if the car be insufficiently heated to complain loudly to the officials, for having done this you may resume your seat and welcome sore throat, malaria, bronchitis, pneumonia and consumption, with the pleasing assurance that the railroad company will be required to pay your doctor's bill and compensate you for physical suffering besides: *Hennings v. R. R. Co.*, 33 Fed. Rep. 858.

It is a charming sight to see a man step airily off a train which draws into the station, and rush to the fond embrace of a loving wife or expectant sweetheart, and as he does this no one imagines that he is performing a feat of the most complicated description, in comparison with which the problem of three bodies sinks into puerile insignificance? "Railroads are run for the public convenience." This was a rather injudicious statement made by a Massachusetts judge. Fortunately it was *obiter*, otherwise it might have revolutionized the law. Perhaps he meant to say "The public are run for the convenience of railroads."

There is a certain intricate action performed by railroad officials, known to the omniscience of the law as an "invitation to alight." Such invitation we may hint to the uninitiated is not couched in terms such as "The Northern Pacific Railroad Company present its compliments to J. S. and will be pleased to dispense with the pleasure of his company at Walla Walla Station." No, indeed. An individual pokes his head in at the door and calls out, "Xyzhirtlmxpxq." It then becomes your duty to conduct yourself in the following manner: Think carefully of the important proposition of law, to wit: That passengers are expected to know that trains stop at places other than stations. Some have been known to stop temporarily in a cut, but under such circumstances it is negligence *per se* for you to alight, even though sunk in absence of mind, and endeavor to scale the embankment: *Smith v. R. R. Co.*, 88 Ala. 538. You must realize the fact that two announcements are some times made of a station, one before and one upon arrival. If in doubt on this dubious point, it is your duty to inform yourself of your whereabouts: *Minick v. R. R. Co.*, 56 N. W. Rep. 780. Having satisfactorily turned over these points in your mind, do not fail, under all circumstances, to be thoroughly convinced that the individual, who so hastily thrust his head in at the door, called out an indistinguishable name, and as hastily withdrew his countenance from your view,—do not fail, we repeat, to convince yourself, that this individual is an officer of the road, and one in authority. This may, to be sure, necessitate your walking

through several sections of the train, and making proper inquiries on the route, but if it should so happen that the voice in question emanated from a throat less august than that of a railroad official, it does not constitute, in the eye of the law, an invitation, and you may be negligent in alighting: *R. R. Co. v. Farrell*, 31 Ind. 408.

The mental process necessitated by these acts is a trifle involved, but the company, so runs the law, must perforce permit every passenger a reasonable length of time in which to alight. But what is a reasonable length of time do not attempt to determine. That is the province of the jury.

We will suppose your intellect acts very rapidly—that you have inspected the surroundings—that you have thoroughly grasped the legal principles which we have presented you—that you have pursued the person who called the station, through the train, and have discovered him to be the conductor; and now finally, you reach the platform, panting with your physical and mental exertions, and just as you are stepping off, in full view of an official, the train starts to move. Ah! happy, thrice happy man, are you hurt under these conditions. For, observes the sapient law, it is negligence on the company's part to start the train when one is plainly perceived in the act of alighting, even though such persons may have waited an unreasonable length of time. "For a human being," said a Texas judge, in a temporary ebullition of christian charity, "does not forfeit the right to live on account of being negligent." This is refreshing: *R. R. Co. v. Weisen*, 65 Tex. 443.

Having fully satisfied yourself that the invitation is one meeting with all the requirements of the law, it is your duty to exercise ordinary care in alighting: *R. R. Co. v. Williams*, 7 S. W. Rep. 88. Perhaps you are under the impression that you know what ordinary care is. Here we beg leave to disabuse your mind. The train is expected to stop at a station a reasonable length of time, and conversely you are expected to occupy only a reasonable length of time in leaving it. Rush rapidly to the platform, and plunge down every step until you reach the last, then pause, for you have much to consider at

this particular point. Should you alight while the train is moving, even though it might not have stopped a reasonable length of time, you are guilty of negligence: *Cousins v. R. R. Co.*, 56 N. W. Rep. 14. If you are standing on the platform while the train is slowly moving into the station, and a sudden jerk precipitates you to the ground, you are negligent: *Seror v. R. R. Co.*, 10 Fed. Rep. 15.

In general, if the train be moving, be it ever so little, 'tis well not to alight. Do you see the transaction of important business slipping from your grasp, do you see home, friends, family, vanishing in the distance, do you realize an empty purse, and the next stop, midnight in a strange city, 100 miles away, under no circumstances may you so far forget yourself as to jump: *R. R. Co. v. Bangs*, 47 Mich. 470; *Johnson v. R. R. Co.*, 70 Penna. 357. You may have agreed with the conductor to stop at your particular place, and not impossibly you may have clinched the bargain by a slight pecuniary consideration, but that is no excuse, better the loss of money, friends, fortune, than the charge of negligence, *per se.*: *Barnett v. R. R. Co.*, 87 Ga. 766. You may imagine it an exceptional case when the train is derailed and is bumping over the ties, and that you might be permitted to jump under such terrifying conditions. Perhaps it is best to err on the safe side. This may or may not be negligence: *R. R. Co. v. Rohrman*, 13 W. N. C., 258. You had better take affairs easily, sit down, light a cigar. This is not negligence.

You are standing on the car steps, the train is moving slowly out, and has not stopped. The conductor, addressing you in that polite, engaging manner that distinguishes American railroad officials, orders you to jump. Now here is a difficult problem. If the attempt be manifestly dangerous, you must resist the polished insinuations of the conductor, and remain on the car. Since the determination of what is "manifestly dangerous" necessitates the injecting of yourself into the minds of a modern jury, an intellectual feat before which Sir Isaac Newton might well quail, possibly it were better if you swallowed the large lump in your throat, and, banishing

the pleasures of a cosy fire, a fascinating book or a steaming supper from your recollection, returned to the car: *Riebel v. R. R. Co.*, 17 N. E. Rep. 107. If, however, you are pulled violently to the ground by a gentlemanly official, while standing upon the steps of a slowly moving train, you are privileged to recover damages: *R. R. Co. v. Wood*, 14 N. E. Rep. 572. N. B.—We are charmed to record this oasis in a desert of negligence.

Suppose the train has stopped. You reach the last step of the platform and prepare to alight. The step is too high from the ground, then call loudly for assistance. Though perhaps you may be confronted by another rule of law which says that the conductor is not required to assist a passenger to alight: *Raben v. R. R. Co.*, 35 N. W. Rep. 645; but this only applies to ordinary circumstances. Never attempt to determine what ordinary circumstances are, but having bel-lowed persistently for assistance, return quietly to the car, and resume your seat with a patient resignation that affords a strong contrast to the conduct of Mrs. McDermott of Wisconsin, who insisted upon jumping, despite the height, and was seriously injured thereby: *McDermott v. R. R. Co.*, 52 N. W. Rep. 85. And, finally, one thing more, notice critically where you are about to step. A certain lady of Pennsylvania stepped upon the bung of a beer barrel which was lying on the station platform as she left the train, but she never got a cent of damages for the court thought this was too ordinary an obstruction: *Bemhardt v. R. R. Co.*, 159 Pa. 360. Just what would be such an extraordinary obstruction as to make the railroad company liable we are not prepared to say. Possibly, a package of nitro-glycerine or a pot of boiling pitch.

But you have avoided bungs, you have not ridden on the coping of the engine tender (see *supra*). You have not shilly-shallied before mounting the train (see *supra*). You are home, you are safe.

Ah, little does Cecilia, Camilla, Evelina or Flabella think, as she clasps her loving Mortimer in her arms, of the way beset with dangers through which he has passed. Hug tighter, Cecilia, and though it be but a short ten miles of iron road that separ-

ates Mortimer from his office, think twice ere you determine to remain in the suburbs another year.

We have had serious hesitancy in sending the above to press. We are willing to confess that since reading up the subject of negligence on railroads our own existence has not been a supremely happy one. There is a consciousness of self, a feeling of helpless ignorance in a vast sea of essential knowledge that oppresses the spirit. Perhaps it is wrong to introduce like feelings into minds now blissfully unconscious of error; perhaps—but the point is too knotty. We will at least save men from riding on engine cowcatchers or dancing the bolero on top of a Pullman Palace car. Doubtless we have not labored in vain.

DEPARTMENT OF WILLS, EXECUTORS AND ADMINISTRATORS.

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TAYLOR v. TRICH.¹ SUPREME COURT OF PENNSYLVANIA.
JANUARY 7, 1895.

Where it was claimed that the testator was subject to delusions, but was otherwise sane. It is not improper for the court to say to the jury that they were to decide "not whether the peculiar views of the testator were scriptural or otherwise, sensible or absurd, but simply whether or not they so impressed his mind, became, as it were, so incorporated into his mental constitution as to control his judgment in regard to the use and disposition of his property, so as to prevent his perceiving or appreciating the ordinary duty he owes to his family, or their claims upon him as a father in that respect." The court also saying that if the evidence did not fairly lead to the conclusion that the testator's mind was overpowered and controlled by his peculiar views so as to prevent him from exercising a reasonable or rational judgment in relation to the disposition of his property, their verdict should be in favor of the will, however, absurd, ridiculous or unfounded they might individually or collectively believe his peculiar views on faith and its effects to have been.

UNJUST AND UNNATURAL WILLS.

The view of a will, which regards it as conferring the power of diverting property from the family of the testator or of distributing such property unequally, is modern. Early custom did not look with favor upon the disinherison of the heir; the connection was too close between the succession to property after death and the performance of the sacrificial rites in honor of the deceased that probably had their origin in ancestor worship (Maine's Early Law and Custom, 78). At the Roman law what actually passed from the testator to

¹ Reported in 146 Pa. 586; 30 A. 1033.

the heir was the *family*, that is the aggregate of rights and duties contained in the *patria potestas*. It was possible by the law of the twelve tables for the testator to exhaust his entire patrimony in legacies, leaving his instituted heir nothing but the bare title (Gaius L. II., tit. xxiii. Nasmith's Outline, 270). Historical writers have occasionally fallen into the error of assuming an injurious license of disinheritance indulged in by heads of families (Montesquien Lib. XXVII., ch. i). The indications, however, are that a will was not customarily regarded by the Romans as a means of disinheriting a family or of effecting the unequal distribution of a patrimony. The rules of law preventing such action increase in stringency as the system of jurisprudence is perfected. The testamentary power had become valued for the assistance it gave in enabling the testator to make an even and fair provision for his real family, emancipated as well as unemancipated, cognati as well as agnati (Maine's Ancient Law, 211).

A will, in which the testator unreasonably passed over his nearest relations in order to make over his property to strangers, was thought to argue a lack of natural affection and was called an "undutiful will." The relations passed over were entitled to have the testament declared null and void, on the ground that the testator was of unsound mind when the testament was made, on bringing an action *de infamioso testamento*. The action could be brought by the children, if there were none by the ascendants, and, failing these by the brothers and sisters, but in the last case only when the person instituted was of bad character (*turpis*). (Morey's Outline of Roman Law, 327; Campbell's Compendium, 85.) In the words of the code this does not mean that the testator was really insane, but that the testament, though regularly made, is inconsistent with the duty of affection the parent owes, for if the testator is really insane at the time, the testament is null (Code of Justinian, Lib. II., tit. xviii. Saunderson's Ed). The fiction insanity (*color insaniae*) declares Sohm "is probably due to the reception of the Greek law. In the early Attic law we find precisely the same form for impeaching an undutiful will as in Rome, the testator being accused by his

relatives of *patria*" (c. p. Schulin l. c. p. 16). There is reason for believing that the Greeks went further in their recognition of claims to a statutory share than the Roman centumviral court (Sohm Institutes Lib. III., ch. ii, § 100, iii).

The statutory share to which an heir succeeded by necessity called the *portio legitima* was fixed by the 18th Novel of Justinian at one-third of the intestacy share when the number of heirs was four or less, and at one-half the intestacy share when the number of heirs was greater than four. Where the heir received something under the will but not enough he was required to proceed by *actio in supplementum legitimæ*. Justinian's most important reform, however, was accomplished by the 115th novel. By this ascendants are required to institute as heirs such of their descendants as would succeed on intestacy and *vice versa*. Disinheritance was permitted only for certain definite statutory reasons to be expressly stated in the testament (Salkowski's Roman Law Lib. III., pt. iv., § 170; Soh'm Inst. 466). These reasons are described by the term "ingratitude." Examples are an attempt on the life of the testator, cruelty to him or refusal of subsistence: (Mackeldey's Roman Law, § 738; Code Napoleon, §§ 955, 1046, 1047; Civil Code of Louisiana, §§ 1559-1562). In *Bosworth v. Briller*, 2 La. Ann., 293, it was held that a parent could disinherit a child for marrying without his consent.

"The law of England," declares Blackstone, "makes no such constrained suppositions of insanity or forgetfulness, and, therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosa* to set aside such a testament": Bl. Comm., Bk. II., p. 503. While, perhaps, no person was bound by the general law of the kingdom to leave anything by will to any particular person, local customs did lay restrictions upon the testamentary power. One of these commonly was to remember his lord with his best chattel, then the church and after these he might dispose of the remainder at pleasure (Glanville Lib. VII, c. 5., Bracton, 60). Another division, in accordance with the custom of gavelkind, is cited by Finalson. Says the costumal of Kent: "Let the goods of gavelkind persons be divided into three parts after the funeral

and debts paid. So that the dead shall have one part and the lawful sons and daughters another and the wife the third, and, if there be no lawful issue, let the dead have one-half and the wife the other" (Finalson's Reeves' History of English Law, Vol. 1, p. 329). The share of the wife and children were called their *reasonable* parts and the writ *de rationabili parte bonorum* was given to recover them. The right to the reasonable part was expressly reserved in *magna charta*, and Blackstone is of the opinion that this was the common law of the land in the reign of Edward III. (Bl. Comm. II., p. 492). Sir Henry S. Maine attributes the growth of freedom in testamentary power to the influence of primogeniture "as the Feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property, which might have been equally divided ceased to be viewed as a duty" (Maine's Ancient Law, 218).

It is interesting to note that in the reign of Edward VI, a commission was appointed to reform the ecclesiastical law. This commission met in 1552, carried on and completed its work, but before it received the royal confirmation the young king died, and the project died with him. In the report it was provided among other reforms, that no son should be passed over in his father's will unless expressly disinherited, and such disinherison would not be good unless for just cause. So also with wives and daughters. These causes were enumerated and follow closely the civil law; one cause is significant of the times, wives and children who became heretics might be passed over (Reeves' History of English Law, Vol. III, p. 50). The customs referred to above and the influence of the civil law are probably the cause of that erroneous but widespread impression of the necessity of leaving the heir a shilling or some other express legacy, in order to effectually disinherit him (Bl. Comm. II., p. 503). A statute of the State of Washington provides, that if children are not mentioned or provided for in the parent's will, the parent will be presumed to have died intestate, as far as such children are concerned (Gen. Stat. Wash., § 1965). The object of the statute is not to compel a substantial provision for children, but to prevent

disinheriting through inadvertence : *Bower v. Bower*, 5 Wash. 225; *Hill v. Hill*, 7 Wash. 409.

Feeling and opinion both in England and America have been so influenced by the practice of freedom in testamentary dispositions, that an interference with this practice would be regarded as an interference with the rights of the individual. "It is as much the duty of the courts to uphold the right of the owner of property to dispose of it by will, according to his pleasure, as to see that he is not imposed upon in the exercise of that right:" *Dumont v. Dumont*, 46 N. J. Eq. 223. Nor does it make any difference from what source testator inherited or derived his property : *In re Fricke's Will*, 19 N. Y. S. 315. The unreasonableness of prejudices or the unfairness of dispositions, however much they may be the subject of criticism, however much the product of bad advice and resentment, cannot alone avail to invalidate a will : *Finn's Estate*, 1 Misc. Rep. 280; *In re Gleespin's Will*, 26 N. J. Eq. 523; *Wintermute v. Wilson*, 27 N. J. Eq. 447, 28 N. J. Eq. 437; *Dale v. Dale*, 36 N. J. Eq. 269; *Salisbury v. Aldrich*, 118 Ill. 199; *Trzevaut v. Rains*, 25 S. W. (Tex.), 1092; *Bennett v. Bennett*, 26 A. (N. J.), 573; *Loeser's Estate*, 3 Pa. D. 817.

No matter how flagrantly the testator has violated the obligations of affection : *In re Blair's Will*, 16 N. Y. S. 874. No matter how sudden the change of testamentary disposition : *In re Clark's Will*, 23 N. Y. S. 712. The omission or disinheritance of a child is entitled to no weight other than as a circumstance to be considered with other evidence tending to show undue influence or want of mental capacity : *Smith v. Harrison*, 2 Heisk. 230; *Bluoit v. Murrin*, 58 Mo. 307. Where force, fraud or undue influence is used the free agency of the testator is destroyed and the instrument obviously is not his will. Want of sufficient mental capacity is the usual ground for contest in the hundreds of will cases tried every year in the courts of this country.

To the medical profession insanity is simply "a condition due to disease of the brain, expressed by impairment of feeling thought and volition : " Hamilton's System of Legal Medicine,

Vol. II, p. 39. Confusion and misunderstanding result from the fact that "insanity" as defined above does not necessarily deprive the testator of testamentary power. The question in every case is not whether the testator was or was not suffering from disease of the brain, but whether at the time of executing his will he had sufficient intelligence to understand the business in which he was engaged, and to know what property he had and who had claims upon it: *Harrison v. Rowan*, 3 Wash. C. C. 580; *DeLafield v. Parrish*, 25 N. Y. 9; *Bulger v. Ross*, 98 Ala. 267; *Craig v. Southard*, 35 N. E. (Ill.) 36. "It would be unjust," said Judge Cooley, "to deprive a man of the control of his property as soon as the indications of mental disease appear. . . . It is with mental health as with physical. A physician discovers evidence of actual or incipient unsoundness in numerous cases of those who pass with their fellows as persons in perfect health. For the purpose of treatment this is useful, but for the ordinary purposes of life the physician must adopt the same standard with the rest of the community, and those persons will be considered in health who pursue their ordinary avocations and discharge the ordinary duties of life without being incommoded or inconvenienced by physical disorders:" *Fraser v. Jennison*, 42 Mich. 207. So in the matter of *Fricke's Will* it appeared on autopsy that deceased had tumors on his brain, but they were not shown to have affected his understanding: 19 N. Y. S. 315.

Eccentricity of habits, moral depravity, or dissipation, do not establish want of capacity: *Prentiss v. Bates*, 88 Mich. 567; *Hutchinson v. Hutchinson*, 38 N. E. (Ill.) 926; *Boardman v. Woodman*, 47 N. H. 120. Nor the weakness of old age: *Pike's Estate*, 31 N. Y. S. 689; *In re Boger's Estate*, 31 A., 359; *Leeper v. Taylor*, 47 Ala., 221. But see *Bever v. Spangler*, 61 N. W. (Ia.) 1072. Nor the excessive use of intoxicating liquors, unless it is shown that the will was made during a period when the reason was actually dethroned from that cause: *In re Jones' Will*, 25 N. Y. S. 109; *Peck v. Cary*, 77 N. Y. 9; *Lewis' Estate*, 140 Pa. 179; *Dimonds' Estate*, 3 Pa. Dist. 554. So also with the morphine habit: *In re Coles' Will*, 49 Wis. 179. It is not necessary to prove that testator

actually recollected all his property; it is sufficient if he was mentally capable of doing so: *Kerr v. Lunsford*, 31 W. Va. 659. Nor can it be said, as a matter of law, that because a person is incapable of transacting ordinary business he is incapable of making a testamentary disposition of his estate: *Sinnet v. Bowman*, 37 N. E. (Ill.) 885; *Taylor v. Cox*, 38 N. E. (Ill.) 656; *May v. Biddle*, 127 Mass. 414; *Whitney v. Twombly*, 136 Mass. 145.

The theory of partial insanity or delusion is of comparatively modern origin and growth. The term "partial insanity," although frequently used, is unscientific and it is safer to speak of monomania or paranoia; In the words of Hamilton: "It is no more possible for a partial disease of the mind to exist than for a partial variola or a partial phthisis. It is true that certain insanities have limited forms of expression, but I have never seen a case even of paranoia or some of its allied psychoses, or moral imbecility, where, sooner or later, there were not, more or less, decided indications of general and profound intellectual disturbance:" Hamilton, Vol. II, p. 114; Williams on Executors, Ed. of 1895, p. 30. Monomania or paranoia is an insanity in which the mental aberration consists in the existence of limited delusions that are of a grandiose or depressed or persecutory nature. In *Drew v. Clark*, 3 Add. 79, the leading case on this subject, it was held by Sir John Nicholl that a will, the direct offspring of insane delusion was void. In that case a prominent doctor had treated his only daughter from her earliest childhood in a manner truly fiendish and finally disinherited her, although there was no reason for such conduct on his part, his daughter being dutiful and highly regarded by all who knew her.

Some of the English cases carried this doctrine to an extreme, holding, that if the testator's mind was unsound in one particular it was altogether unsound, and, therefore, incapable of performing a rational act, such as the making of a will: *Waring v. Waring*, 6 Moo. P. C. 341. A different doctrine subsequently prevailed, and it is now held that to render it invalid the will must be the direct product of the delusion: *Boughton v. Knight*, L. R. 3 P. & D. 64; *Smee v.*

Smee, L. R. 5 P. Div. 84. For example, a monomania on the subject of eating was held not to affect testator's capacity to make a will: *Jenckes v. Smithfield*, 2 R. I. 255. Where, however, a testator believed that he was a son of George IV, and under that delusion, made a will leaving his property to a library at Brighton, a favorite resort of that king, the will was set aside as the offspring of delusion: *Smee v. Smee*, L. R. 5 P. Div. 84. So, also, where testator had delusions of persecution: *Society v. Hopper*, 43 Barb. 625; *Ballantine v. Proudfoot*, 62 Wis. 216; *Edwards v. Davis*, 30 W. L. B. (O.) 283. That his family were trying to poison or injure him: *Riggs v. The Society*, 95 N. Y. 503. That his wife was unfaithful: *In re Gannons' Will*, 2 Misc. Rep. 339; *Barbo v. Rider*, 67 Wis. 398. Or his child illegitimate: *Haines v. Hayden*, 54 N. W. (Mich.) 911. And where deceased had suddenly conceived an intense and unreasoning hatred of a member of the family: *Miller v. White*, 5 Redf. 320; *Merritt v. Rolston*, 5 Redf. 220.

In the matter of *Lockwood's Will*, testator executed an instrument giving all his property to charity, except a sum to his executor, "as high as one quarter of the estate, large enough to be above any bribe that may be offered by my brothers and sisters for the redemption of this will and the heirship to my estate." The court said, "I am persuaded that the alleged will must be rejected, that it is unnatural, unreasonable and strange on its face." 8 N. Y. S. 345. In *Carter's Estate*, 11 Pa. C. C. 140, testator, an accomplished man, fell into a hypochondriacal condition and excluded from participation in his estate two daughters, one because of her marriage to a man against whom he had conceived a sudden, groundless and unreasoning antipathy, and the other because of her presence at the ceremony, at the same time reducing the shares of other children present to life estates. An issue *devisavit vel non* was granted on the ground that the evidence, if believed, was sufficient to establish an insane delusion.

On the other hand, if there are facts, however, insufficient, from which a prejudiced narrow or bigoted mind might derive a particular idea or belief, it cannot be said that the mind is unsound in this respect. The belief may be illogical or pre-

posterior, but it is not, therefore, evidence of insanity. *In re Whitt's Will*, 121 N. Y. 406; *Coit v. Patcher*, 77 N. Y. 533; *Estate of Carpenter*, 94 Cal. 406. In *Martin v. Thayer*, 37 W. Va. 38, it was developed that testator missing his will from his papers and unjustly suspecting his grandchild of taking it excluded her from a later will. The original will was subsequently founded enclosed in a deed in his box. A verdict for the contestants was set aside, the court saying, that if the testator had testamentary capacity, it was none the less his will, although he may have been influenced to exclude parties from sharing in his bounty under a mistaken apprehension of facts. This question frequently arises where it is alleged that deceased was subject to a delusion as to the illegitimacy of his children. "It is conceded," said the court in *Potter v. Jones*, "that the conclusions he (the testator) drew from the facts are wholly unwarrantable and without any justification, indicating at least an unrelenting jealous disposition, but unjust and absurd, as they may be, they were not the pure creation of a perverted imagination without any foundation in reality:" 20 Ore. 245; *In re Smith's Will*, 24 N. Y. S. 928; *Clapp v. Fullerton*, 34 N. Y. 196; *Coit v. Patcher*, 77 N. Y. 533; *Cole's Will*, 49 Wis. 179; *Philips v. Chater*, 1 Dem. 533. The speculative belief of an individual concerning things natural or supernatural, no matter how irregular, is not to be regarded as insanity: *Smith's Will*, 543; *Chapin's Will*, 32 Wis. 557; *Bonard's Will*, 16 Abb. Pr. 128; *Hartwell v. McMaster*, 4 Redf. 389. It is within very narrow limits that any such belief can be confidently pronounced a delusion. "The question," it was remarked in *Taylor v. Trick*, "is not so much what he believed on these subjects as what effect had his beliefs on his mental condition:" (165 Pa. 586 at p. 600.) If such beliefs unsettle the judgment and leave the subject under the influence of a delusion that usurps the reason and controls the will, then such person has not a sound, disposing mind and memory: *Robinson v. Adams*, 62 Me. 369.

As already stated, injustice and inequality in the distribution of property may be considered in connection with other facts showing incapacity, as a circumstance tending to show

unsoundness of mind: *Pooler v. Christman*, 34 N. E. 57; *Tawney v. Long*, 76 Pa. 106; *Bitner v. Bitner*, 65 Pa. 347; *Knox v. Knox*, 11 S. 125; *McFadden v. Catron*, 25 S. W. (Mo.) 506. To take the question of alleged unreasonableness from the jury is reversible error: *Simms v. Russel*, 57 N. W. (Ia.) 601; *Sherley v. Sherley*, 81 Ky. 240. At the same time it is improper to single it out from the other facts of a case and instruct specially as to it, thus giving it undue prominence and tending to mislead the minds of the jury from the real issue of capacity: *Blesdoe v. Blesdoe*, 1 S. W. 10; *Burney v. Torrey*, 14 S. W. (Ala.) 685. It is only a circumstance and never regarded as sufficient alone to invalidate a will: *Gamble v. Gamble*, 39 Barb. 373. This is particularly true where the facts suggest a reason for such discrimination as from motives of gratitude or personal attachment: *In re Snelling*, 136 N. Y. 515; *In re Mondorf*, 110 N. Y. 450; or to secure peace at home, *Perry v. Perry*, 29 S. W. (Tenn.) 1. Or a preference for children who formed part of the household, or for the younger children: *In re Murray's Estate*, 11 Pa. C. C. 263; *Nicwander v. Nicwander*, 37 N. W. (Ill.) 698. Or a statement that a child has already been provided for: *King v. Holmes*, 84 Me. 819. Family discord, unfilial conduct of children, the separation of husband and wife, are all circumstances to be carefully considered: *Chandler v. Jost*, 11 S. 636; *In re Snydam's Will*, 32 N. Y. S. 449. "A person will be influenced in the formation of his attachments and prejudices by his associations, relationship, benefits or injuries. This is natural and he may, in the exercise of his discretion, dispose of his property according to his predilections thus formed:" *Mitchell v. Mitchell*, 43 Minn. 73; *Trumbull v. Gibbons*, 2 Zab. 117; *Lee v. Lee*, 4 McCord, 183; *McDonaldson's Estate*, 130 Pa. 480; *Blair v. Cline*, 33 P. (Ore.) 542; *Barnes v. Barnes*, 66 Me. 286; *Collins v. Brasil*, 63 Ia. 432; *Austen v. Graham*, 8 Moo. P. C. 493; *White v. Driver*, 1 Phill. 84; *Foster's Estate*, 142 Pa. 62. A will cannot be termed inofficious, which disregards the claims of collaterals in favor of a wife: *McCann's Estate*, 2 Pa. Dist. 181; *Barlow v. Waters*, 28 S. W. (Ky.) 785; *Harwood v. Baker*, 6 Moo. P. C. 282. Nor the passing

over of collaterals in favor of others less needy: *Conway v. Vicard*, 122 Ind. 266, particularly where the deceased never regarded them as probable objects of his bounty: *In re Shear's Will*, 26 N. Y. S. 494.

It will be seen from the cases cited, as well as from many others excluded from want of space, that while the number of these contests is great the proportion of the successful is small. This is as it should be, for in most instances they are undertaken through personal animosity or in the hope of extorting a compromise from the beneficiaries under the will. Even in cases of seeming hardship it is seldom that success can be predicted with any degree of confidence. As a means of enforcing parental authority as a protection to the aged, and the friendless from indifference and neglect, the courts firmly maintain the testator's right to freely dispose of his property.

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LOUISIANA. APRIL 9, 1894.

Acceptance of a Guaranty—Concealment of Facts by Guarantor.

A contract of suretyship or guaranty, like other contracts, requires the concurrence of intention in two minds, one of whom promises something to another who accepts. Consequently, a mere offer to guaranty is not binding until acceptance by the person to whom it is made, and until acceptance it is revocable.

Of the acceptance of an absolute guaranty notice is not requisite; but of a mere offer of guaranty, the guarantor's acceptance must be notified to the guarantor, such notification being of the essence of the agreement.

Unless interrogated, a creditor is under no obligation to disclose facts in no manner connected with the business which is the subject of the

¹ Reported in 15 So. Rep. 649 (46 La. Ann.).

suretyship, though such facts would probably have a decided influence on the surety in entering into the contract; and the current and weight of authority supports the proposition, that unless inquiry be made by the guarantor, it is not obligatory upon the guarantee to volunteer a disclosure of the debtor's previous embarrassment, and his failure to make such a disclosure will not constitute a fraudulent concealment that will operate the surety's discharge.

REQUISITES OF CONTRACTS OF SURETYSHIP AND GUARANTY.

The contract of suretyship or guaranty is said to have been "coeval with the first contracts recorded in history."

The Proverbs of Solomon contain more than one allusion to sureties and suretyship, declaring it not only unwise, but as indicating a lack of understanding, to enter into such an obligation (Prov. 11, 17, 22). (See note, Story on Contracts, § 1107.)

However inconsistent it may be with the laws and teachings of Solomon, selfishness and prudence have yielded to friendship and to the demands of social and commercial affairs, and we find the contract of a guarantor or surety to be an important factor in commercial transactions, and an important feature of commercial law. It has long been established that "sureties are favorites of the law:" *Lafayette v. James*, 92 Ind. 240. "Nothing can be clearer," says Mr. Justice STORY, "both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness:" *Miller v. Stewart*, 9 Wheat. 680.

Not only has it been the inclination of the common law to preserve to the fullest extent the rights of guarantors and sureties in the construction and enforcement of their contracts, regarding them as *strictissimi juris*, but the statute law also

has intervened for their protection by regulating the form of their contracts; the fourth section of the Statute of Frauds (29 Car. 2, C. 3) providing that "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In some states this statute is in force, while in most of the others the provision above quoted has been substantially re-enacted. (See Baylies on Sureties and Guarantors, 62.) Independent of this statutory requirement, the same essential elements are required in the formation of a contract of guaranty as in the formation of any other contract; they embrace (1) the mutual assent of the parties; (2) that the parties be capable of contracting; (3) that the contract be supported by a valuable consideration. (DeColyar on Guarantees, p. 2.)

With reference to the first element mentioned the same author says (p. 2): "Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. Until therefore an acceptance be given (which must be an absolute and unqualified acceptance of the previous offer), the promisor is not liable."

Acceptance may assume three forms: (1) simple assent; (2) the giving of a promise; (3) the doing of an act. (Anson on Contracts, 16). In the case of ordinary contracts any one of these three modes of acceptance usually involves *per se*, a communication of the fact of acceptance to the promisor, but in the case of a guaranty or suretyship, the acceptance or performance of the consideration by the guarantee does not necessarily involve a communication of that fact to the promisor or guarantor; especially is this likely to be true where performance of the consideration or acceptance consists in the "doing of an act," for the peculiarity of the guarantor's obligation is that the consideration for his undertaking moves

toward and is received by his principal, who thereby has notice of the acceptance, while the guarantor may not.

Such being the case a question of some nicety and importance frequently arises in determining under what circumstances it is necessary, in order to bind the guarantor, that he be notified of the acceptance of the guaranty by the guarantee.

This was one of the questions involved in the decision of the principal case by the Supreme Court of Louisiana. The suit was founded upon the following instrument, viz.: "New Orleans, June 4, 1891, Messrs. Lachman & Jacobi, San Francisco, Cal. Gentlemen: I hereby agree to become surety for Henry Block & Bro., for the sum of \$10,000, jointly and severally with Henry Block & Bro. This agreement to bind me in the sum of \$10,000, until the 15th day of October, 1891. Very respectfully, (Signed), C. Lazard."

It appears that in order to secure a continuance of business transactions (consignments of liquors) between the Lachman firm and the Block Bros., the latter were requested by the former to procure security; this, it seems, was necessitated by the fact that there had been an embezzlement or defalcation by one of the latter firm, connected with previous transactions. The above paper was executed and forwarded by the latter firm to the former. One of the defenses urged was that there was no acceptance of the guaranty on the part of the plaintiff.

Mr Justice WATKINS, after reviewing the provisions of the Civil Code, in regard to the formation of contracts, including the contract of suretyship, says (p. 651): "Applying them to the agreement or proposition of the defendant, and it seems to be clear that the plaintiffs were not bound to accept same before it became complete, because it was made in terms which evidence a design on the part of Lazard to give them the right to conclude it by their simple assent; and the facts disclosed by the record satisfy us that the plaintiffs acted on the defendants' agreement to become surety for Henry Block & Bro. by extending them a line of credit, they would not otherwise have extended to them, and that this line of credit began immediately after the receipt of the defendants' agreement, is evidenced by the items of the account sued on, and

which are undenied. And if acceptance be deemed essential, the circumstances clearly indicate plaintiffs' assent—such an assent as puts it beyond the power of the defendant Lazard to voluntarily withdraw from his engagement. Certain it is that no formal notification of the creditor's acceptance is required by our law as a condition precedent to the completion of a contract of suretyship." The court further considered the proposition of guaranty to be "absolute and unconditional in its terms" and distinguished it from a mere offer of guaranty which is not binding until acceptance by the person to whom the offer is made, and which remains revocable until such acceptance occurs."

This distinction is one which is recognized in principle, both in this country and in England: De Colyar on Guarantees, p. 2; Burge on Suretyship, 16; Pittman on Principal and Surety, 28; 9 Am. & Eng. Ency. of Law, p. 78. The difficulty, however, arises in applying it to the varying circumstances of cases and in reconciling some of the cases in which it has been applied. In this connection, Brandt, in his treatise on Suretyship and Guaranty, p. 278, says: "When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another at the option of the party to whom the application for credit is made, the great weight of authority is that the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty . . . When the transaction is admitted to amount only to an offer of guaranty, it is universally held that in order to charge the party making the offer he must, within a reasonable time, be notified that his offer is accepted. The courts, however, differ more or less as to what is a guaranty and what is an offer to guaranty."

This doctrine has been firmly established by the Supreme Court of the United States in a line of cases, beginning with a dissent of Chief Justice MARSHALL, in *Russell v. Clark's Ex'rs.*, 6 Cranch, 69-92 (1812), as follows: "The court cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagement of Robert Murray & Co. to Nathaniel Russell.

Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagement."

This same rule was announced by STORY, J., in *Cramer v. Higginson*, 1 Mason, 323 (1817).

In *Edmondston v. Drake*, 5 Peters, 624 (1831), the same court held that it was necessary, in order to charge the writer of a letter of credit, that the person acting upon it should give him notice that he had acted on it. In *Douglass v. Reynolds*, 7 Peters, 113 (1833), action was brought upon the following letter of guaranty: "Messrs. Reynolds, Byrne & Co.—Gentlemen: Our friend Chester Haring, to assist him in business, may require your aid from time to time, either by acceptances or endorsements of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time, for a sum not exceeding \$8,000, should the said Chester Haring fail to do so."

It was held by Mr. Justice STORY, "that to entitle the plaintiffs to recover on the guarantee they must prove that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. . . . A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the giving of it or not. It may be most material, not only as to his responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct and his exercise of vigilance in regard to the party in whose service it is given." This case further decides, that in a continuing guaranty notice need not be given of each credit allowed, but that notice should be given of the total responsibility of the guarantees following the last transaction; and also, that notice should be given of demand and non-payment by the principal debtor within a reasonable time.

Lee v. Dick, 10 Peters, 482 (1836), was based upon the following letter: "Messrs. N. & J. Dick & Co.—Gentlemen: Nightingale & Dexter, of Maury Co., Tenn., wish to draw on

you at 6 or 8 months date, you will please accept their draft for \$2000, and I do hereby guaranty the punctual payment of it. Very respectfully your obedient servant, Sam'l B. Lee."

Mr. Justice THOMPSON held that the guarantees should have given notice either of an intention to accept, or that they had accepted and acted upon the guarantee, but the court refused to lay down any rule with respect to the time within which such notice must be given.

The case of *Douglass v. Reynolds*, *supra*, appeared before the court again in 1838 (12 Peters, 497), and the rule before laid down as to notice of acceptance was adhered to; Mr. Justice McLEAN said, however, "this notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference."

In *Adams v. Jones*, 12 Peters, 207 (1838), Mr. Justice STORY used the following language: "and the question which under this view is presented, is whether upon a letter of guaranty addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of the opinion that is necessary, and this is not now open to question in this court, after the decisions which have been made in *Russell v. Clarke*, 7 Cranch, 69; *Edmondston v. Drake*, 5 Peters, 624; *Douglass v. Reynolds*, 7 Id. 113; *Lee v. Dick*, 10 Id. 482; and again recognized at the present term in the case of *Reynolds v. Douglass*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance in guarding himself against losses, which might otherwise be unknown to him, and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from further responsibility."

The doctrine of the foregoing cases has been ably criticised by Judge HARE in his note to *Douglass v. Reynolds* (3 American Lead. Cases, 5th Ed. 59); on page 94, he says: "It

becomes plain that the numerous instances in which notice of acceptance has been held essential to the obligation of guaranties, imply and depend upon the single proposition that assent cannot give rise to a contract, unless each party knows or is informed that the other has agreed, which may be true when the obligation of the contract is meant to be reciprocal and mutual, but not when the sole object is to induce the performance of an act which is subsequently performed."

And Justice COWEN, in *Douglass v. Howland*, 24 Wend. 35, says: "The short answer which the English Cases, decided long before our revolution, furnish, is that the guarantor, by inquiring of his principal, with whom he is presumed to be on intimate terms, may inform himself perfectly whether the guaranty were accepted, the conditions fulfilled and payment made."

The next case was *Devis v. Wells*, 104 U. S. 159 (1881), concerning the following guaranty: "For and in consideration of \$1 to us in hand paid by Wells, Fargo & Co., (the receipt of which is hereby acknowledged), we hereby guarantee unto them, the said Wells, Fargo & Co., unconditionally at all times, any indebtedness of Gordon & Co. . . . to the extent of and not exceeding \$10,000 for any overdrafts now made, or that may hereafter be made, at the bank of said Wells, Fargo & Co. This guaranty to be an open one and to continue one at all times to the amount of \$10,000 until revoked by us in writing, &c."

Mr. Justice MATTHEWS, referring to the rule requiring notice of acceptance, said: "There seems to be some confusion as to the reason and foundation of the rule, and consequently some uncertainty as to the circumstances in which it is applicable. In some instances it has been treated as a rule inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of a contract of guaranty, which requires after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be

given of the intention of the guarantee to act under it, as a condition of the promise of the guarantor. The former is the sense in which the rule is to be understood as having been applied in the decisions of this court. . . . The rule in question proceeds upon the ground that the case in which it applies is an offer or proposal on the part of the guarantor, which does not become effective and binding as an obligation until accepted by the party to whom it is made; that until then it is inchoate and incomplete and may be withdrawn by the proposer."

"Frequently the only consideration contemplated is, that the guarantee shall extend the credit and make the advances to the third person, for whose performance of his obligation, on that account, the guarantor undertakes. But a guaranty may as well be for an existing debt or it may be supported by some consideration distinct from the advance to the principal debtor passing directly from the guarantee to the guarantor. In the case of the guaranty of an existing debt such a consideration is necessary to support the undertaking as a binding obligation.

In both these cases no notice of assent other than the performance of the consideration is necessary to perfect the agreement, for, as Professor Langdell has pointed out in his summary of the Law of Contract, p. 987: 'Though the acceptance of an offer and the performance of the consideration are different things, and the former does not imply the latter, yet the latter does necessarily imply the former, and as the want of either is fatal to the promise, the question whether an offer has been accepted can never in strictness become material in those cases in which a consideration is necessary, and for all practical purposes it may be said that the offer is accepted in such cases by giving or performing the consideration.' " The court held in this case that the recital of considerations in the instrument, made it a "complete and perfect obligation of guaranty" upon delivery, and that, therefore, notice of acceptance was unnecessary.

It is interesting to compare this case with the following case of *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524 (1885), which involved the following writing: "For value received, we

hereby guarantee to the Davis Sewing Machine Company, of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment by said John W. Poler of all indebtedness by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler under this contract to the amount of \$3000."

It was held by Mr. Justice GRAY, that there was "no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, "value received," without stating from whom, are quite as consistent with a consideration received by the guarantees from the principal debtor only."

The contract was held to be incomplete, and the guarantee was not liable for the price of goods sold by the company to the agent and not paid for by him.

The court summarized the rules upon the subject as follows: "A contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. If the guaranty is signed by the guarantor, at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty; or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor, without any previous request of the other party, and in his absence, for no consideration moving between them, except future advances to be made to the principal debtor, the guaranty is in legal effect an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract."

These latest two decisions by the court, which was foremost in announcing the doctrine in this country, illustrate how closely the line is drawn in applying the principles to cases where the facts differ but slightly.

The rules of law (*supra*) upon which the decision in the *Devis Sewing Machine Co.* case was based, seem to be somewhat in conflict with those which governed the ruling of the Supreme Court of Louisiana in the principal case. The latter decision is based upon the provisions of the Rev. Civ. Code (La.), relating to contracts in general, article 1802 of which declares that a proposer "is bound by his proposition, and the signification of his dissent will be of no avail *if the proposition be made in terms which evidence a design to give the other party the right of concluding the contract by his assent, etc.*" The Court considered, in the first place, that the absolute character of the instrument implied a waiver of any acceptance, further than a mental one, uncommunicated, followed by acting upon the proposition; second, that no notice of acceptance was required, inasmuch as a failure by the guarantee to dissent from the proposition within a reasonable time implied notice of such fact. The court referred to the case of *Pope v. Andrews*, 9 Car. & P., 564, as supporting the latter proposition, this case, however, does not seem to have been a suit upon a guaranty, nor did it involve the question as to the right of a guarantor to insist upon notice of acceptance in order to bind him. And *McIver v. Richardson*, 1 M. & S., 557, which did involve that question, appears to have been decided the other way.

Upon the first point the court differs from those decisions, which seem to place the contract of guaranty upon a slightly different footing from ordinary contracts, as regards the question of acceptance. For instance, in *Oaks v. Weller*, 13 Vt. 110, it was said: "When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes, his responsibility for a thing to be done for another, he may not know that it is done, or even if he does, he will not know whether it is done on his proposition or on the sole credit of the third person, or some other security. The responsibilities and duties of a guarantor imply certain correlative rights and privileges, which, without notice of his condition, he can never exercise."

PETERS, J., in *Stradman v. Guthrie*, 4 Met., (Ky.) 156, said: "It is a general rule, that if a person offer to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intent to act upon it, gives him a right to demand the money. . . . But where the offer is to guaranty, a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or of his intent to act upon it."

In the case of *Gardner v. Lloyd*, 110 Pa., 278, the court, DEAN, J., said: "Men are bound to pay their own debts; in the absence of an express contract, the law implies one, but it will imply no contract to pay other men's debts, nor any essential element of such contract, such as waiver of notice where the settled law requires notice that an offer to guarantee has been accepted."

Mr. Justice KNOWLTON, in the recent case of *Bishop v. Eaton*, 37 N. E. (Mass.) 665 (1894), lays down a doctrine which seems to be on the medium line and very reasonable. The proposition of guaranty was in these words: "If Harry needs more money, let him have it or assist him to get, and I will see that it is paid." The court held it to be "an offer to become effectual as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer, and furnishes the consideration. Ordinarily, there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer.

"But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that, which constituted the acceptance.

"In such a case it is implied in the offer that to complete the

contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act, so far that the promisee cannot be affected by a subsequent withdrawal of it, if, within a reasonable time afterwards, he notifies the promisor. In accordance with these principles it has been held in cases like the present, when the guarantor would not know of himself from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration."

These principles are in harmony with those announced in the principal case, excepting that notice is held requisite when the act of acceptance is "of such a kind that knowledge of it will not quickly come to the promisor."

But it is a difficult and not altogether profitable task to attempt to distinguish cases and reconcile decisions upon this question: "The rights and duties of parties to guaranties must, from the variety of circumstances under which they have been entered into, be materially governed by the particular circumstances of each case:" 2 Am. L. C. 87.

The distinguishing feature of the guaranty in the principal case was, that it purported to be a present, absolute undertaking, in which the liability was limited and made certain as to duration and amount; no consideration, however, was mentioned or suggested therein.

In the following cases the guaranty was held to be complete, and notice not necessary: *Davis v. Wells*, *supra*; *Johnson v. Bailey*, 15 S. W. (Texas) 499; *Klosterman v. Olcott*, 41 N. W. (Neb.) 250; *Taylor v. Tolman Co.*, 47 Ill. App. 264; *Nading v. McGregor*, 23 N. E. (Ind.) 283; *Currie Fertilizer Co. v. Byfield*, 34 N. E. (Ind.) 451; *Hall v. Weaver*, 34 Fed. 104; *Dand v. Nat. Park Bank*, 34 Fed. 846.

Where the contract guaranteed or agreement to accept is contemporaneous with the guaranty, notice is not necessary: *Wiles v. Savagr*, 1 Story, 22; *Beckhold v. Lyon*, 29 N. E. (Ind.) 912; *Wright v. Griffith*, 121 Ind. 478; *Lamp v. Armen-*

gol, 26 S. W. (Tex.) 941. Nor where there has been a precedent request: *Hasselman v. Japanese Co.*, 27 N. E. (Ind.) 318; *contra*, *Kay v. Allen*, 9 Pa. 320.

Where the consideration for the guaranty moves indirectly toward the guarantor, no notice is necessary: *Doud v. Nat. Park Bank*, 54 Fed. 846; *Nading v. McGregor*, 23 N. E. (Ind.) 283.

In these cases the rule requiring notice of acceptance to complete the contract of guaranty has been adopted: *Davis Sewing Machine Co. v. Richards*, *supra*; *Winnabago Paper Mills v. Travis*, 58 N. W. (Minn.) 36; *Patterson v. Reed*, 7 W. & S. 144; *Emerson v. Graff*, 5 Casey, 358; *Kay v. Allen*, 9 Pa. 320; *Kellogg v. Stockton*, 29 Pa. 464; *Coe v. Buchler*, 110 Pa. 366; *Gardner v. Lloyd*, 110 Pa. 278; *Steadman v. Guthrie*, 4 Met. (Ky.) 156; *Ruffner v. Love*, 33 Ill. App. 60; *Newman v. Stricator*, 19 Ill. App. 594; *Rankin v. Childs*, 9 Mo. 674; *Mussey v. Rayner*, 22 Pick. 223; *Allen v. Pike*, 3 Cush. 238; *Bishop v. Eaton*, *supra*; *Wilkins v. Carter*, 19 S. W. (Texas) 997; *Oaks v. Weller*, 13 Vt. 110; *Hill v. Calvin*, 4 How. (Miss.) 231; *Walker v. Forbes*, 25 Ala. 139; *McCallum v. Cushing*, 22 Ark. 540; *Bank v. Sloo*, 16 La. 539, and see cases cited in Brandt on Suretyship, sec. 186, note 1; and in 9 Am. & Eng. Ency. of Law, p. 78, 79.

Notice may be inferred from facts and circumstances: *Reynolds v. Douglass*, 12 Peters, 497; *Raffner v. Love*, 33 Ill. App. 601.

Knowledge from any source is equivalent to notice: *Powell v. Chicago Carpet Co.*, 22 Ill. App. 409; *Tolman Co. v. Means*, 52 Mo. App. 385; *Mitchell v. Railton*, 45 Mo. App. 273; *Webster v. Smith*, 30 N. E. (Ind.) 139.

Notice may be waived: *Fisk v. Stone*, 50 N. W. (Dakota) 125.

Closely allied to the guarantor's duty to give notice of acceptance is the duty to make disclosure of facts affecting the liability of the guarantor and material to the subject-matter of his contract.

This was a second question involved in the case under consideration: "Was it the duty of Lachman & Jacobi to have

given information to C. Lazard, of Henry Block's defalcation and embezzlement in anticipation of the former becoming the surety or guarantor for the latter's firm?" The court disposed of the question as follows: "It is our deliberate conviction that such embezzlement did not constitute a fact material to the agreement, or transaction of suretyship, or guaranty, and it was not necessary for the guarantees to disclose it, and that their failure to disclose it does not operate the release or discharge of the defendant." A review of the decisions upon this question does not come within the scope of this annotation, as such relates to the discharge of the surety by the fraud of the creditor.

De Colyar points out (p. 260) that, under the English authorities, "no concealment will vitiate a guaranty unless it be *fraudulent*."

It was said in *Insurance Co. v. Lloyd*, 10 Ex. 523, that "the mere relation of principal and surety does not require the voluntary disclosure of all the material facts in all cases. The same rule as to disclosures does not apply in cases of principal and surety as in cases of insurance on ships and lives."

Lord CAMPBELL's criterion as to whether a disclosure should be made voluntarily was "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction:" *Hamilton v. Watson*, 12 C. & F. 109.

In *Magre v. Manhattan Ins. Co.*, 92 U. S. 93, Mr. Justice SWAYNE said: "But there is a duty incumbent on him, (the surety). He must not rest supine, close his eyes and fail to seek important information within his reach. If he does this and a loss occurs he cannot, in the absence of fraud on the part of the creditor, set up as a defence, facts then first learned, which he ought to have known and considered before entering into the contract." The decision in this case was similar to the one under discussion.

STATTON, C. J.; in *Seawomen's Assn. v. Smith*, 7 S. W. (Texas) 793, suggests the difficulty in the surety securing from his principal truthful admissions of moral delinquency as distinguished from matters showing him to be merely negli-

gent, dilatory or unskillful, though not dishonest. The court thinks that in the one case disclosure should be made, while in the other it need not.

See cases cited in 24 Am. & En. Ency. of Law (Suretyship), 793. and Brandt on Suretyship, Sec. 419, *et seq.*

It does seem that in those cases where the opportunity to obtain information exists, the creditor should be entitled to presume that the surety has availed himself of it, and not be required to volunteer the disclosure, especially in view of the fact that the very purpose of a guaranty or suretyship is to provide against possible risk, and the relation between the principal and surety being presumed to be intimate, the latter should be vigilant and guard himself, else he must realize the truth of Solomon's saying: "He that is surety for a stranger shall smart for it; *and he that hateth suretyship is sure.*"

G. HERBERT JENKINS.

Philadelphia, April, 1895.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 725 Duane Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

COMMENTARIES ON THE LAW OF INSURANCE. (2 Vols.) By CHARLES FISK BRACH, JR. Boston and New York: Houghton, Mifflin & Co. Riverside Press, Cambridge. 1895.

HALF A CENTURY WITH JUDGES AND LAWYERS. By JOSEPH A. WILLARD. Boston: Houghton, Mifflin & Co. 1895.

THE UNITED STATES INTERNAL REVENUE TAX SYSTEM. Edited by CHARLES WESLEY ELDRIDGE. Boston and New York: Houghton, Mifflin & Co. Riverside Press, Cambridge. 1895.

THE UNITED STATES INCOME TAX LAW SIMPLIFIED FOR BUSINESS MEN. 3d Ed. Enlarged and Revised. By FREDERICK A. WYMAN. 1895.

THE INSURANCE AGENT. His Rights, Duties and Liabilities, etc. By JOHN A. FINCH. Indianapolis: The Bowen-Merrill Co. 1894.

THE INCOME TAX LAW. Arranged with Annotations. By FRANCIS B. BRACKEN, assisted by EUSTACE GRIMES. Philadelphia: Kay & Bro. 1895.

HANDBOOK OF EQUITY JURISPRUDENCE. By NORMAN FETTER. Horn-book Series. St. Paul, Minn.: West Publishing Co. 1895. 463 pages.

COMMENTARIES ON THE LAW OF INJUNCTIONS, as Determined by the Courts and Statutes of England and of the United States. By CHARLES FISK BRACH, JR., of the New York Bar. Author of "Modern Equity Jurisprudence," "Modern Equity Practice," &c., &c. In Two Volumes. Albany: H. B. Parsons, Law Publisher. 1895.

THE LAW OF MUNICIPAL CORPORATIONS IN THE STATE OF OHIO, embracing the Statutes in force, with FORMS and NOTES of the Decisions of the Supreme and other Courts of the State relating thereto. By HIRAM D. PECK. Fourth Edition. Cincinnati: The Robert Clarke Co. 1894.

SELECTED CASES, ETC.

CASES ON CONSTITUTIONAL LAW. Part III. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever. 1894.

AMERICAN ELECTRICAL CASES. With Annotations. Vol. II. Ed. by WILLIAM W. MORRILL. Albany: Matthew Bender. 1895.

DIGEST OF INSURANCE CASES. For Year, Ending Oct. 31, 1894. By JOHN A. FINCH. Indianapolis: The Rough Notes Co. 1894.

NATIONAL CITATIONS. A Compilation showing all Provisions of the United States Revised Statutes. AMERICAN CITATION CO. St. Louis: Nixon-Jones, Printing Co. 1895.

PAMPHLETS.

NATIONAL CORPORATIONS. By J. J. H. HAMILTON. Reprinted from University Law Review.

REPORT OF THE SECOND ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH.

BOOK REVIEWS.

HANDBOOK OF AMERICAN CONSTITUTIONAL LAW. By HENRY CAMPBELL BLACK, M. A. St. Paul, Minn: West Publishing Co., 1895. Pages 627.

Practical works on Constitutional Law are becoming every year more and more of a necessity in a lawyer's office. The steady deterioration of the legislative branch of the government of the different states has led to the enactment, either through ignorance or design, of innumerable statutes which violate the Federal or State Constitutions. The self interest which prompts an attorney and his client to establish the unconstitutionality of an act, affords the surest means by which the integrity of the Constitution as the fundamental law may be maintained. Such subjects as "Special and Local Legislation," "Delegation of Legislative Powers," "Title and Subject Matter of Statutes," relate to the safe guards which the Constitution throws around the process of legislation. Every lawyer should feel it his duty, not only as a lawyer, but also as a citizen, to see that the constitutional provisions aimed against legislative corruption are strictly upheld and enforced. Mr. Black's book will afford efficient aid in attacking legislative abuse of the Constitution. The book is stated to be intended primarily for the use of students at law, and instructors in Law Schools and Universities. The book, however, is not merely theoretical, but practical to a degree unusual among books on this subject. The author states the leading principles and doctrines in the form of a series of brief rules or propositions, numbered consecutively throughout the book, and these are explained, amplified, and illustrated in the subsidiary text, and supported by the citation of pertinent authorities. The work is a worthy addition to the excellent series of text books known as the Horn Book Series.

A. B. WEINER.

A TREATISE ON THE INCOME TAX UNDER THE ACT OF 1894.

By ROGER FOSTER, Author of Foster's Federal Judiciary Act, and EVERETT V. ABBOTT, Lecturer at the Metropolis Law School; both of the New York Bar. Boston: The Boston Book Company. 1895.

This is the most complete and able work on the subject among a number which have been announced, and in the event of the act being sustained will doubtless recommend itself for constant reference. A short history of the Income Tax, which forms the burden of the first chapter, is a most fitting introduction to the proper consideration of the subject. The constitutional objections form the subject of Chapter II, and while these will be but of theoretical interest to the practitioner, they undoubtedly are entitled to consideration in a comprehensive treatise like this: The Incidence of the Tax; Income Subject to Tax; Returns and Assessments; Payment; Collection and Remedies of the Taxpayer represent the remaining sub-divisions carefully and exhaustively treated of.

In Part second one hundred pages are devoted to the text of the act, annotated by sections. The appendix contains the text of previous income tax laws from that of August 5, 1861, down to and including the Act of August 28, 1894; the joint resolution of February 19, 1895, extending time to file returns; Regulations of the Treasury Department; a full report of the case of *Morr v. Miller*, decided January 23, 1895; and a table of cases cited in the book.

The index, while not particularly full or elaborate, would seem to be adequate to put the reader on notice and aid his reference to any desired subject.

The learned authors, as they have stated in their preface, have wisely "abstained from expressing any opinion upon the economical merits or constitutionality of the act," while presenting a summary of the arguments which may be used on either side of the principal constitutional objections. If the act is sustained by the Supreme Court, the constitutional aspect will be eliminated; but as an economic measure it is likely to be for some time a live question, and it is well

that all thoughtful citizens should study the question in all its bearings. The right of the sovereignty to tax anything is the most essential attribute of that sovereignty, and its limitations are only to be found in the organic law and the wisdom of enlarging such limitations beyond the strict letter of the constitution may be gravely questioned. The wisdom of any income tax or any particular measure is always open to challenge and consideration, but when a valid act becomes law there can be no doubt that loyalty and good citizenship demand the most scrupulous obedience irrespective of individual opinion as to the merits of any particular measure.

The history of income tax legislation above referred to is of great value as an aid in reaching a conclusion as to the wisdom of any act as an economic measure, and as influencing the stand which a citizen may assume relative to advocacy of a repeal.

The brief chapter on this aspect of the question is, therefore, a valuable contribution to the literature of the subject. The notes to this chapter are also of use as a bibliography on Income Tax Legislation, to those who desire to pursue this subject. On this point attention may be called to a thoughtful article on the "Taxing Power of the United States," by James J. Hamilton, of Scranton, Pa., Albany Law Journal, Vol. 51, p. 200.

EDW. P. ALLINSON.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

MAY, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR APRIL.

Edited by ARDEMUS STEWART.

The time limited on a railroad ticket for the completion of the trip must, in order to be binding, allow sufficient time for a person using ordinary diligence to accomplish the trip: *Gulf, C. & S. F. Ry. Co.*, (Court of Civil Appeals of Texas,) 30 S. W. Rep. 294.

Carriers.
Limited
Ticket

A very peculiar decision on a somewhat similar point was rendered a year or so ago by the Court of Errors and Appeals of New Jersey, against the dissent of Justices MAGIE, ASBETT, BROWN and KREUGER. The plaintiff had bought an excursion ticket from R. to M. and return, "via B. Branch," "not good to stop off *en route*." The road from R. to B., where it was necessary to change cars, was the main line, and that from B. to M. was the B. Branch. On his return from M. the plaintiff would have been obliged, if his train were on schedule time, to wait in the B. station for half an hour for a train to R. Half a mile from B., however, his train had to wait to allow a belated train to pass. The plaintiff then left

the train, and walked to B., arriving there in time to catch the belated train. But the majority of the court held that he had no right to do this, under the conditions of his ticket; that the belated train was not a connecting train, and the ticket was not good on it; and that therefore he was liable to pay fare: *Prune. R. R. Co. v. Parry*, 27 Atl. Rep. 914. This, however, would seem to be an utterly indefensible ruling. It does not appear that one of the conditions of the ticket was that it should be good only on connecting trains, and his walk to the station from the point where the train stopped could hardly be called a stop-off, as he in fact anticipated his train. One cannot but wonder what the learned judges who decided this case would have held if his train had been so delayed as to render it impossible to get home before the time limit expired. Probably they would have said that it was his duty to start the day before.

In the opinion of the Supreme Judicial Court of Massachusetts, the rule that a person who by mistake takes a wrong train is not obliged to pay for his ride to the first station at which he has an opportunity to alight, does not apply to one who has a season ticket, and takes a train in the belief that it is good on that train; if not entitled to ride on that ticket on that train, the company may recover fare: *New York & N. E. R. R. Co. v. Feely*, 40 N. E. Rep. 20.

The Supreme Court of Vermont has recently held, that an agreement by which the plaintiff is to take certain notes, collect them at his own expense without charge to the owner, and divide the amount collected with the latter, under which agreement he had implied authority to bring suits, is champertous and therefore void: *Hamilton v. Gray*, 31 Atl. Rep. 315.

The Court of Appeals of Maryland has lately decided a very important question of constitutional law, in *Short v. State*, 31 Atl. Rep. 322. The Public Local Laws of that State, Art. 10, §§ 268-270, imposed upon persons residing in Dor-

Fares,
Taking Wrong
Train

Champerty

Constitutional Law,
Compulsory Labor,
Roads

chester county two days, at least, of compulsory labor in every year, for the purpose of keeping the roads in repair, with the privilege of furnishing a substitute, or of paying a certain sum per day in lieu of personal labor. This act was held to be constitutional, not being such a poll-tax as is prohibited by the constitution, nor being in violation of the Fourteenth Amendment to the Constitution of the United States, as that does not control the power of a State over its own citizens.

Such an act is not unconstitutional as denying the right of trial by jury: *Haney v. Board of Comrs. of Barton Co.*, 91 Ga. 770; S. C., 18 S. E. Rep. 28, nor is it in violation of a constitutional provision that no poll-tax shall be levied for county. or state purposes, or of a provision of the bill of rights that there shall be no involuntary servitude in the state: *Dennis v. Simon*, (Ohio,) 36 N. E. Rep. 832.

Persons cannot be indicted jointly, however, for failing to work on a public road or to pay the statutory sum in lieu thereof: *State v. Wainwright*, (Supreme Court of Arkansas,) 29 S. W. Rep. 981.

According to a recent decision of the Supreme Court of Missouri, in *Ex parte O'Brien*, 30 S. W. Rep. 158, when a court issues a commitment for one charged with interrupting its proceedings by making a murderous assault upon a person named in the court's immediate presence without rendering any judgment, or ordering one to be entered before the commitment, adjudicating that the respondent had been guilty of contempt, the commitment is illegal; and a commitment for such cause is also illegal, when the proof shows that the assault, which was made in an attempt to arrest the person assaulted, occurred in the rotunda outside of the court-room, and that because of a swinging door, the density of the crowd, and the near-sightedness of the judge, he could not have seen the occurrence, and that his subsequent inquiries showed that he did not, in fact, see it.

When a company, composed of a large number of local

milk dealers, which is incorporated for the purpose of "buying and selling milk at wholesale and retail," but only acts as a seller's agent to find purchasers; charging the former a commission for that service, adopts and acts under a by-law giving the board of directors the power to fix the price to be paid by the stockholders for milk, the company is an unlawful combination to control the price of milk: *Pro. v. Milk Exchange, Ltd.*, (Court of Appeals of New York,) 39 N. E. Rep. 1062; affirming 29 N. Y. Suppl. 259.

The Supreme Court of the United States, in *State of California v. So. Pac. Co.*, 15 Sup. Ct. Rep. 591, has recently

Courts,
Supreme
Court of the
United States,
Original
Jurisdiction

decided, (1) That when an original case is pending in that court, to be there disposed of in the first instance, and in the exercise of an exceptional jurisdiction, it is not befitting the gravity and finality of its adjudication to proceed to judgment in the absence of parties whose rights would be in effect determined thereby, even though they might not, in subsequent litigation in other tribunals, be technically bound; and therefore, when such absent parties cannot be made parties to the suit without ousting the jurisdiction of the court, the case will be dismissed; and (2) That the original jurisdiction of the Supreme Court in cases between a state and a citizen of another state rests solely in the character of the parties, and not at all on the nature of the case; and therefore, when the parties are not such as are prescribed by the constitution, the jurisdiction cannot be aided by showing that a federal question is involved.

Justices HARLAN and BREWER dissented from the former of these propositions.

When a deed, delivered in escrow, is fraudulently abstracted from the depository by the grantee, without performing the conditions on which it was to be delivered to him, it is void, even in the hands of a *bona fide* purchaser of the land granted: *Jackson v. Lynn*, (Supreme Court of Iowa,) 62 N. W. Rep. 704.

Deed,
Escrow,
Fraudulent
Possession by
Grantee

The Supreme Court of Missouri has lately held, against the dissent of Chief Justice BLACK, and Judges MACFARLANE and GAKTT, that since the wife's inchoate right of dower is defeated by the acquisition of land by a railroad, by condemnation proceedings, and also by a conveyance by the husband to the company of a right of way without joining her in the deed, she will be barred of her dower in land conveyed immediately in fee to a third party without her joining, but ultimately conveyed by a subsequent grantee to the railroad company, by a deed purporting to be in fee; because such a deed, in Missouri, conveys only an easement in the right of way: *Choutreau v. Mo. Pac. Ry. Co.*, 30 S. W. Rep. 299; *Baker v. Atchison, T. & S. F. R. R. Co.*, 29 S. W. Rep. 301. The logic of this is not apparent; and it is only necessary to read the profound and exhaustive dissenting opinion of BLACK, C. J., in the latter case, to be convinced of its injustice.

According to a recent decision of the Supreme Court of Vermont, when two water rights on opposite sides of a stream are owned by one person, and the spent water from the mills on one side of the stream has been discharged below the dam that fed the mills on the other side, the right to so discharge the spent water will continue, upon the owner's death, and the division of the estate in severalty among the respective heirs, by which the water right became vested in different persons: *Mason v. Horton*, 31 Atl. Rep. 291.

An act prohibiting the printing in more than one column, on the official ballot, the name of a candidate who has received the nomination of two or more parties, is constitutional, under a provision that the legislature shall have power "to pass laws to preserve the purity of elections and guard against abuses of the elective franchise:" *Todd v. Board of Election Commissioners*, (Supreme Court of Michigan,) 62 N. W. Rep. 564.

The Supreme Court of New York, First Department, has

again decided, following its former decision in *Goodman v.*

Voters, Bainton, 31 N. Y. Suppl. 1043, that under the
Students . Constitution of New York, Art. 2, § 3, which pro-

vides that, for purposes of voting, no person shall be deemed to have gained a residence while a student in any seminary of learning, it is immaterial that a student has no other domicile than the seminary: *In re Garvey* 32 N. Y. Suppl. 689. But FOLLETT, J., who did not sit on the hearing of the former case, dissents in a very able opinion, which serves to throw a strong doubt upon the majority decision. All other considerations apart, it is hardly to be believed that the constitution intended to disfranchise any citizen, and yet this is the practical effect of such a decision. It will not do to put this aside by any plea of the duty of the courts to administer the law, regardless of consequences, or any reliance upon the worm-eaten maxim of "*ita lex scripta est.*" Courts are presumed to use common sense, if nothing else, in the construction of both statutes and constitutions, and to adopt the construction most consonant therewith. To allow such a voter the privilege of the franchise, which the constitution professes to secure him, is certainly doing no violence to the spirit of that document, while to blindly adhere to the letter thereof is, in this case, a flagrant example of sticking in the bark. It is to be hoped that the Court of Appeals will take a more liberal view of the case.

As an ordinary rule, a student does not change his domicile by occasional residence at college: *Granby v. Amherst*, 7 Mass. 1; but the mere facts that a student, who has a domicile in one town, resides at a public institution in another town for the sole purpose of obtaining an education, and that he has his means of support from another place, do not constitute the sole test of his right to vote in the latter town. The right of suffrage is acquired only by change of domicile, and the question of change of domicile is to be decided by all the circumstances of the case. If the father is living and the son remains a member of his family, returns to his home to pass his vacations, and is maintained by his father, these circumstances will rebut any presumption of a change; but, if, on the other hand, the father is dead, and he

passes his vacation elsewhere than at his father's former home, or if he describes himself as of such a place, and, otherwise shows an intention to continue there, then a presumption of change will arise: *In re Opinion of Judges*, 5 Metc., (Mass.) 587. The presumption, however, is against the change, and merely calling a place a person's residence does not make it so: *Sanders v. Getchell*, 76 Me. 158. Nor will the payment of road taxes while attending college have any weight in determining the question of residence, when the statute imposing the tax requires only *inhabitancy*, and not *residence*, as the condition of liability thereto: *Dale v. Irwin*, 78 Ill. 170; and one who becomes a resident of a county for the purpose of attending college, and who has formed no intention of remaining after the completion of his college course, is not entitled to vote in that county: *Vanderpool v. O'Hanlon*, 53 Iowa, 246; S. C., 5 N. W. Rep. 119.

A student at a theological seminary, however, being of age, and otherwise qualified to vote, and being also emancipated from his father's family, may vote in the town in which the seminary is situated: *Putnam v. Johnson*, 10 Mass. 488. An undergraduate of a college, free from parental control, who regards the place where the college is situated as his home, and who has no other home to which to return in case of sickness or domestic affliction, is as much entitled to vote as any other resident of the town pursuing his usual vocation. It is *pro hac vice* the student's home, his permanent abode in the sense of the statutes: *Dale v. Irwin*, 78 Ill. 170. So, if a student in good faith elects to make the place where the college is situated his home, to the exclusion of all other places, he may acquire a legal residence, though he may intend to remove therefrom at some fixed time, or at some indefinite period in the future: *Pedigo v. Grimes*, 113 Ind. 148; S. C., 13 N. E. Rep. 700. And even, (and this we commend to our New York friends,) when the constitution provides that the residence of a student at any seminary of learning shall not entitle him to the right of suffrage in the town where such seminary is situated, it does not prevent a student from gaining a voting residence there if the other conditions concur. H.

does not gain a residence as a student, but in spite of that fact: *Sanders v. Gatchell*, 76 Me. 158. See 2 AM. L. REG. & REV. (N. S.) 220.

According to the Court of Criminal Appeals of Texas, a person illegally arrested, even though he has acquiesced in the arrest, may use such force as is necessary to regain his liberty; and if there is reasonable ground to believe that the officer intends to shoot to prevent his escape, may shoot the officer in self-defense: *Miers v. State*, 29 S. W. Rep. 1074.

An injunction will not lie to restrain a city from closing a vacated and unimproved alley, ten to fifteen feet below street grade, when the plaintiff's land forms but a small part of the block through which the alley runs, and fronts on a street, and all the other owners desire to close it: *Christian v. City of St. Louis*, (Supreme Court of Missouri,) 29 S. W. Rep. 996.

Judge Morrow, of the District Court for the Northern District of California, in a recent charge to the grand jury, has asserted that an officer of a railroad company engaged in interstate commerce, who, as a matter of personal favor, issues a free pass for transportation from one state to another to a person not within any of the exceptions contained in § 22 of the interstate commerce act, is guilty of unjust discrimination, in violation of § 2 of that act: *In re Charge to Grand Jury*, 66, Fed. Rep. 146.

One who solicits others to join with him in the purchase of a quantity of liquor, receives from each the money to pay for the share wanted by each, and afterwards buys and distributes the liquor among those who contributed to its purchase, is guilty of selling liquor without a license: *Hunter v. State*, (Supreme Court of Arkansas,) 30 S. W. Rep. 42. HUGHES and RIDDICK, JJ., dissented, with good reason. The objections to this decision are best stated in the language of the former: "It does not appear

from the evidence that the defendant had any interest in the whisky sold by the distillery, that he was the agent of the distillery, or that he received any money for the whisky purchase, save as agent of those who joined him in the purchase, and that what he received he paid over as agent for those interested with him in the purchase, with what he contributed. . . . It seems clear, beyond question, that in this case there was no sale by the defendant, and that he purchased the five gallons of whisky for himself and as the agent of others who joined him in the purchase: that the purchase was a joint purchase, out of which the defendant made no profit, and in which he had no interest, save, as stated, to the extent of his contribution to buy jointly with others. It seems that to hold this transaction to be a sale by the defendant would be to violate elementary principles of law and the plainest principles of reason."

The courts will take judicial notice of the last official United States census, to determine the population of a county: *State v. Marion County Court*, (Supreme Court of Missouri,) 30 S. W. Rep. 103.

This rule has been generally adopted: *Hawkins v. Thomas*, (Ind.,) 29 N. E. Rep. 157; *Bank v. Cheney*, 94 Ill. 430; *Pro. v. Williams*, 64 Cal. 87; S. C., 27 Pac. Rep. 939; *Pro. v. Wong Wang*, (Cal.,) 28 Pac. Rep. 270; *State v. Bruskamp*, (Iowa,) 54 N. W. Rep. 532; *Guldin v. Schnylkill Co.*, 149 Pa. 210. But it was rejected, on grounds of political expediency, by the Court of Appeals of New York, in *Pro. v. Rice*, 31 N. E. Rep. 921.

The Supreme Court of Utah has decided, that an act providing that in civil cases a verdict may be rendered on the concurrence therein of nine or more members of the jury, is constitutional: *Slackey v. Enzensperger*, 39 Pac. Rep. 541.

This follows the decisions in *Hess v. White*, 9 Utah, 61; S. C., 33 Pac. Rep. 243, and *Fred. W. Wolf Co. v. Salt Lake City*, (Utah,) 37 Pac. Rep. 262. But these cases stand almost alone, and the overwhelming weight of authority is, that in

the absence of any constitutional provision the right of trial by jury implies a right to the concurrent judgment of twelve men upon the matter in issue, and that a statute authorizing the rendition of a verdict by any less number is unconstitutional and void: *Jacksonville, T. & K. W. Ry. Co. v. Adams*, 33 Fla. 608; S. C., 15 So. Rep. 257; *In re Opinion of Justices*, 41 N. H. 550; *Carroll v. Byers*, (Ariz.) 36 Pac. Rep. 499; *Bradford v. Territory*, 1 Okl. 366; S. C., 34 Pac. Rep. 66.

The full and carefully considered opinion in *Hess v. White*, however, presents the opposite view with much force. It clearly disproves the conclusiveness of the argument that the jury meant by the Constitution of the United States was one of twelve jurors acting unanimously, since that was the only jury known to the common law, by showing that other equally essential qualifications of a common-law jury, (*c. g.*, that the jurors should be freeholders,) though in full force at the adoption of the Constitution, have now become obsolete, and are not reckoned as essential to the right of trial by jury, and points out the non-essential character of unanimity and the advantages of the majority verdict in the following terse language: "Wherever this provision has been tried, it has been found to be a distinct benefit. Such a provision is simply a change in the procedure of applying legal remedies. It is general in its application; it is fair and just to all. No man's property rights are injured by it, and no man can be said to have a vested right in the unanimous action of a jury, any more than in the fact that a juror was anciently required to be a freeholder. All litigants could waive, in civil trials at common law, and under our constitution, this unanimity of verdict. If they could waive it, then it was not one of the requisites which must be preserved in order to preserve a jury trial in civil actions." It is difficult to find arguments strong enough to carry this position.

But, while the weight of authority is at present opposed to permitting this rule to be established by statute, there would seem to be no valid objection to permitting it to be done by constitutional provisions. Yet even then, such a provision

will not authorize the legislature to provide for certain contingencies in which a jury shall consist of less than twelve men, in the discretion of the trial court: *McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399; S. C., 53 N. W. Rep. 561.

The preceding observations, however, apply only to civil actions. In criminal suits, the defendant can neither waive his right to be tried by a jury of twelve, nor be deprived by the legislature of his right to the unanimous verdict of those twelve: *Allen v. State*, 54 Ind. 461; *Canceri v. Pro.*, 18 N. Y. 128. Whether this right can be affected by constitutional provisions, is a doubtful question.

When the facts furnished by a client to his attorney are misleading, and defamatory in character, and their incorporation into the petition is foreign to the object and purposes of the suit, the client is responsible in damages: *Wimbish v. Hamilton*, (Supreme Court of Louisiana,) 16 So. Rep. 856.

The Supreme Court of Georgia has very properly ruled, that an offer by the publisher of a newspaper, made pending a suit against him for a libel, to open the columns of the paper to the plaintiff for any explanation or statement he wishes to make, counts for nothing on the trial of the action: *Constitution Pub. Co. v. Way*, 21 S. E. Rep. 139.

According to a recent decision of the Supreme Court of Pennsylvania, when a land-owner, by means of openings on his own land and subterranean passageways leading therefrom, mines and removes coal from adjoining land of another without his knowledge, the latter having also no means of obtaining knowledge of the trespass, the limitation of his right of action for compensation does not begin to run until he discovers the trespass, or until discovery is reasonably possible: *Leury v. H. C. Frick Coke Co.*, 31 Atl. Rep. 261.

A finding by the examining court that there was probable

cause to believe the plaintiff guilty of the crime charged, and the binding of him over for trial, is only *prima facie* evidence of probable cause; and further, **Malignant Prosecution, Probable Cause** probable cause cannot be shown by admissions of the plaintiff after his arrest, nor by the finding of property on his premises, similar to that stolen, if that fact was not known to the defendant when he began the prosecution: *Louisville N. A. & C. Ry. Co. v. Hendricks*, (Appellate Court of Indiana,) 40 N. E. Rep. 82.

An experienced lineman, who is provided with non-conducting rubber gloves, but does not use them, and is killed by touching the exposed ends of live wires, which were perfectly obvious to the view, must be held to have assumed the risk: *Junior v. Missouri Electric Light & Power Co.*, (Supreme Court of Missouri,) 29 S. W. Rep. 988. **Master and Servant, Assumption of Risk**

The Queen's Bench Division of England has lately decided a very peculiar case. While an omnibus belonging to the defendants was being driven by their servant, a policeman, being of opinion that the driver was drunk, ordered him to cease driving at once. The driver and the conductor of the omnibus thereupon authorized a third person, who was passing, to drive the omnibus home on their master's behalf. That person, while driving, negligently drove over the plaintiff and injured him. The court held, that as, under the circumstances, the servants of the defendants had an implied authority to appoint another person to act as a servant on their master's behalf, it being a case of sudden emergency, the defendant was liable: *Gwilliam v. Twist*, [1895] 1 Q. B. 557. **Deputing Authority**

According to the Supreme Court of New York, Fourth Department, the trainmen of a railroad company which runs its trains over the road of the defendant company, under a contract by which the superintendent of the latter arrange all the time tables and controls the conductors of the other company, are not fellow-servants with the employes of the defendant, though the same person is general **Fellow-servants**

manager of both roads, and one person is superintendent of both on the division where the accident occurred: *Turney v. Syracuse, B. & N. Y. R. Co.*, 32 N. Y. Suppl. 627.

The Court of Appeals of New York has recently held, in *Cameron v. N. Y. Cent. & H. R. R. Co.*, 40 N. E. Rep. 1, that when a servant is competent when employed, but afterwards becomes habitually negligent, and causes the death of a fellow-servant by his violation of the employer's rules, the employer will not be liable, on the ground of negligence in failing to discover the servant's habitual misconduct, and in omitting to discharge him, if the work of the servant is of such a nature that the employer has no opportunity to learn of his misconduct, and it is not reported by his fellow-servants, although they were under positive instructions to report all violations of rules.

One of the absurd claims ever made in a court of law was lately rejected by the Supreme Court of Indiana, in *Abbitt v. Lake Erie & W. R. R. Co.*, 40 N. E. Rep. 40.

Negligence imputed. Fellow-servant. Two car inspectors were at work at night, one under the car, changing a coupler, and the other holding a torch to light him, when the employees of another company backed down upon them, without notice or warning, and the inspector under the cars was killed. The attorney for the company asked for an instruction which in effect would have imputed the negligence of the inspector with the torch, in not looking for the backing train, to the one under the car; but this was refused by the trial court, and the refusal was approved by the Supreme Court, HOWARD, J., saying tersely, "It is usually quite enough for a person to be responsible for his own negligence, without being called upon to answer for the negligence of some one else."

The Supreme Court of Georgia has recently held, that when a husband has abandoned his wife and child, and failed to provide for them, the wife, while living separate from her husband and having the entire care and custody of the child, may maintain an action against a railway company for injuries to the child caused by the negligence of the company since the separation took

Injury to
Child.
Action by
Mother

place, by reason of which she is deprived of his services: *Savannah, F. & W. Ry. Co. v. Smith*, 21 S. E. Rep. 157.

According to the same court, the following questions: (1) Whether a railway company, having stopped a train immedi-

Railroad,
Questions for
Jury,
Non-suit

ately after the conductor called out the station, failed in extraordinary diligence towards the plaintiff by not warning him that the station had not been reached, so as to prevent him from alighting in the darkness of the night at an unsafe place; and (2) Whether the plaintiff was negligent in so alighting without first assuring himself that the station had been reached or that the place was safe, are more proper for submission to a jury than for determination by the court on a motion for non-suit: *Miller v. East Tenn., V. & G. Ry. Co.*, 21 S. E. Rep. 153. The non-suit granted in this case was accordingly set aside.

When the water of a natural stream is polluted by the discharge of drainage therein by a city, and also by the discharge

Nuisance,
Joint
Liability,
Release

of noxious matter from gas works owned by a private individual, to the injury of one through whose lands the stream flows, the city and owner of the gas works, though not joint tort-feasors, are jointly and severally liable in damages; but a release of the owner of the works will not release the city from liability, unless executed in full satisfaction of all the injury sustained by reason of the nuisance: *City of Valparaiso v. Moffit*, (Appellate Court of Indiana,) 39 N. E. Rep. 909.

The son of a clerk of court, acting as his father's deputy, and generally recognized as such, is an officer *de facto* with respect to his acts in that capacity; and an affidavit in attachment made before him is not void, although, on account of his minority, he could not have been lawfully appointed as deputy: *Wimberly v. Beland*, (Supreme Court of Mississippi,) 16 So. Rep. 905.

The Court of Appeals of New York has lately rendered a

very interesting decision, to the effect that under the statute of that state, (New York Laws, 1885, c. 364.) providing for the retirement on pension of members of the police force of the city of New York, who have served twenty years or upward, the police commissioners have a discretionary power to retire members of the force, and cannot be compelled to do so by mandamus: *Pro. v. Martin*, 39 N. E. Rep. 960.

Pension,
Retirement,
Discretion

The Court of Civil Appeals of Texas has recently held, in accord with the weight of authority, that the governor of a state has power to pardon a person convicted of crime after he has served his term of imprisonment, and that such a pardon will restore the person to competency as a witness on the trial of an action, the right of which accrued before the pardon was granted: *Missouri, K. & T. Ry. Co. of Texas v. Howell*, 30 S. W. Rep. 98.

Pardon,
Effect

The Supreme Court of New York, Second Department, has lately ruled, in *In re Quigley*, 32 N. Y. Suppl. 828, that a police justice, who, during a strike of the employes of a street railway company, discharged strikers who were arrested and brought before him, charged with throwing stones at the cars and assaulting the main operator of the cars, in spite of the evidence against them, and who stated that the strikers had a perfect right to take men off the cars if they could do so in an orderly way, is guilty of such misconduct as to warrant his removal.

Police Justice,
Misconduct
Removal

In *Frame v. Felix*, 31 Atl. Rep. 375, the Supreme Court of Pennsylvania has held, that if a board of city commissioners, in specifications for work to be done, fix a minimum price to be paid by the contractor for labor, and award the contract for the work on the basis of those specifications, their action is a violation of a statutory provision requiring such work to be awarded to the lowest responsible bidder, and is void, and may be set aside on bill filed by a tax-payer and property owner.

Public
Contracts,
Awarding

According to the Supreme Court of Illinois, a receiver appointed by an Illinois court on a creditor's bill to enforce an Illinois judgment may hold the debtor's assets as against an attaching creditor, who is a citizen of Illinois, even though the bill was brought by a citizen of New York; the mere fact that the creditor who brought the bill is a non-resident does not make the enforcement of the judgment a matter of comity, when the ancillary proceedings are brought in the same state: *Halbrook v. Ford*, 39 N. E. Rep. 1091.

Receiver,
Right to
Assets

The Court of Civil Appeals of Texas has just rendered a very interesting decision on the question of the right of a parent whose child has been expelled from boarding school to recover advance payments for tuition, as follows: (1) When the evidence shows that it is the understanding between the parties that, in case of expulsion of the pupil for misconduct, advance payments should be liquidated damages, and not recoverable, and the rules of the school provide that there will be no reduction in case of withdrawals, and that all payments will be forfeited on expulsion, there can be no recovery; (2) That the conduct of a pupil at a boarding school, in continually playing truant, and finally leaving for his home, is ground for expulsion; especially when the father refuses to permit the teacher to whip his son for misconduct, and takes no steps himself to correct him: *Fessman v. Setley*, 30 S. W. Rep. 268.

Schools,
Private,
Advance
Payments,
Recovery on
Expulsion

The Court of Appeal of England has recently laid down the broad rule that an action of slander will lie, without proof of special damage, for words imputing dishonesty or malversation in a public office of trust, although the office is not one of profit, and whether there is a power of removal from the office for such misconduct or not: *Booth v. Arnold*, [1895] 1 Q. B. 571.

Slander,
Misconduct
of Public
Officer

A difference in the punctuation of similar statutes does not

necessarily indicate a change in the construction; especially when the punctuation is the work of the printer, not of the legislature: *Griffiths v. Montandon*, (Supreme Court of Idaho,) 39 Pac. Rep. 548.

See 34 Cent. L. J. 253.

The Supreme Court of the United States has added another laurel to the crown it has of late been so industriously weaving for itself by deciding, by a vote of five to four, that the Income Tax act is wholly unconstitutional, on the ground that an income tax is a direct tax, and therefore must be apportioned according to representation. This result was brought about by a change of heart on the part of one Mr. Justice SHIRAS, of Pennsylvania.

The Circuit Court for the Southern District of New York has lately ruled, in *William Rogers Mfg. Co. v. R. W. Rogers Co.*, 66 Fed. Rep. 56, that the rule that the user of a personal name as a trade-mark will not be protected against its use in good faith by a defendant who has the same name, does not apply to the case of a corporation, which selects its own name, especially when that name was selected in order to mislead.

The owner of land, across which there is a private way for passage only, has the right to protect his fields by such a gate or other structure as will not unreasonably obstruct the use of the way: *Hartman v. Fick*, (Supreme Court of Pennsylvania,) 31 Atl. Rep. 342.

The Master of the Rolls of Ireland has recently decided, that a gift over of real estate in the event of the devisee marrying a man "beneath her in life, that is to say, below her in social position," is good: *Greene v. Kirkwood*, 1 Ir. R. 130.

In a recent case in the Court of Chancery for Ireland, a

decedent by her will declared that she had certain sums of money on deposit in "the Australian Bank" and another, and bequeathed to certain legatees specific portions of the gross amount. She had, however, no sum on deposit in either bank, but had, standing in her name, eleven shares in the Union Bank of Australia. The vice-chancellor accordingly held that these shares passed under the bequest of the sum on deposit in the Australian Bank: *Moss v. Cranfield*, [1895] 1 Ir. R. 80.

A devise of No. 204 Lexington avenue, when the only premises owned by the testator on that avenue, both at the time of the execution of the will and of his death, were No. 738 Lexington avenue, and he never at any time owned No. 204, will pass No. 738: *Govin v. Metz*, 29 N. Y. Suppl. 988; and directions to an executor to sell a house and lot in N., and pay certain legacies out of the proceeds, empowers him, in the light of evidence that the testatrix owned no realty except a house and lot in B., a suburb of N., to sell and make title to the property in B.: *Hawkins v. Young*, (N. J.) 29 Atl. Rep. 511.

A belief in spiritualism is not conclusive evidence of a want of testamentary capacity, provided the testator is not affected with any delusion respecting matters of fact connected with the making of the will or the objects of his bounty: *McClary v. Stull*, (Supreme Court of Nebraska,) 62 N. W. Rep. 501. See 31 AM. L. REG. 505, 569.

The Supreme Court of Louisiana has lately ruled, in *Gravely v. Southern Ice Machine Co.*, 16 So. Rep. 866, that any service which would be sufficient as against a domestic corporation may be authorized by statute as sufficient to commence an action against a foreign or non-resident corporation; and that such service may therefore be made upon the president of a foreign corporation during the time he is temporarily abiding within the jurisdiction of the court in which the suit is brought.

The Supreme Court of the United States, however, has

Demonstrative
Legacy.
Inaccurate
Description

Insane
Delusion,
Spiritualism

Writ.
Service in
Corporation

recently held, that in a personal action against a foreign corporation, neither doing business within the state, nor having an agent or property therein, the service of a summons on its president, while temporarily within the jurisdiction, is not a sufficient service on the corporation: *Goldrey v. Morning News of New Haven*, 15 Sup. Ct. Rep. 559; affirming 42 Fed. Rep. 112. To the same effect is *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850.

RECENT DEVELOPMENT OF CORPORATION LAW BY THE SUPREME COURT OF THE UNITED STATES.

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At the end of the century which has seen the birth of the modern business corporation it may be said without exaggeration that many fundamental questions in regard to the legal status of corporations are still unsettled and that authorities are not at one in regard to the scientific explanation of corporate phenomena of every day occurrence. The nature of a corporation is still under discussion, and it may be doubted whether any six learned judges would to-day give explanations even substantially similar of the difference between corporations and joint stock companies or statutory partnerships. The result of this conflict of opinion in regard to the nature of a corporation is seen in the diversity of doctrine in the matter of the status of persons who have engaged in business nominally as a corporation but without complying with all the formalities prescribed by the general corporation law under which they are associated. Can a creditor who has dealt with them as a corporation take advantage of the defect in organization and treat the associates as partners? The answer of many authorities is in the negative¹ and of many others in the affirmative.² Of the former class MORAWETZ is one who presses the view of a *de facto* corporation so far³ that, to be consistent, he would be compelled to admit that, for some purposes, persons may become in law a corporation without

¹ *Cochran v. Arnold*, 58 Pa. 399; *Eaton v. Aspinwall*, 19 N. Y. 119; *Stout v. Zulich*, 48 N. J. Law, 399; *Morawetz*, § 748—and cases there cited.

² *Kaiser v. Bank*, 56 Iowa, 304; *Morawetz*, § 748—and cases there cited.

³ § 748.

entering into any relation to the state and without deriving from the state the vital spark of corporate life which English jurists⁴ have been wont to hold that the sovereign alone can dispense. In fact he speaks of "the formation of a corporation without authority of law."⁵ Of the latter class is PARSONS,⁶ who would distinguish between defective organization, under a special charter and under a general corporation law, holding that where the state permits self-incorporation, the conditions of immunity must be exactly complied with, or the associates will continue to be partners with an unlimited liability.⁷ The obvious justice attained as a result of the former view and, the obvious injustice which would follow from the latter, predispose the mind in favor of limiting the creditor's right to recover. At the same time such an explanation as that of MORAWETZ seems so unsound upon principle that one hesitates to accept it. The same remark applies to the theory advocated in New Jersey and elsewhere that the creditor's right will be limited, because the creditor is *estopped* from questioning the legality of the corporate existence.⁸ It is, perhaps, not too much to expect that the courts will hereafter find the solution of the difficulty in a scrutiny of the true significance of the contract between the creditor and his debtors in such a case, admitting, at the same time, that no corporation of any kind has come into existence. As it would be entirely competent for the creditor of a partnership to agree in express terms that he would limit his right of recourse to the contributions of the partners,⁹ it should seem that no more rational explanation of the true meaning of the contract could be offered in the case suggested than that the parties had done by implication that which they might have accomplished by express words.

⁴ See Pollock and Maitland's History of English Law, p. 470. The chapter on "Fictitious Persons" is extremely interesting and suggestive. (Little, Brown & Co., Boston. 1895.)

⁵ See Vol. II, Chap. IX.

⁶ Parsons, (James): Partnership, § 24.

⁷ Parsons answers satisfactorily the argument of Morawetz, that if members of a *de facto* corporation are not protected from partnership liability, the stockholders of a corporation *de jure* must be charged individually for *ultra vires* acts, § 24.

⁸ *Shout v. Zutick*, 48 N. J. Law, 399.

⁹ *Brown v. Slate Co.*, 134 Mass. 390.

There is great diversity of opinion in regard to many of the most important questions relating to corporate mortgages. To what extent is it true that corporate bonds are negotiable? What is the legal effect of the certificate by a mortgage trustee endorsed upon a bond that the bond is what it purports to be, and that it is entitled to the security of a certain mortgage or trust deed? How far can a subsequent holder of a bond compel the performance by the corporation mortgagor of covenants in the mortgage instrument that the mortgagor will use the borrowed moneys to feed the lender's security? What is the standard of the duties of a mortgage trustee? These are questions of vital importance. If there is any doubt that the law on these subjects is unsettled, a reference to *Belden v. Burke*¹⁰ will dispel the doubt. The views of the court below and of the Supreme Court of New York disclose a great diversity of view; and while the conclusion of the Supreme Court seems to be undoubtedly correct many of the questions involved may be said to be of "first impression."

Again, there are almost as many views of *corporate power* in England and in this country as there are tribunals with jurisdiction to pass upon the question. What contracts may a corporation make? On what theory may it make them? What are the rights of parties to an unauthorized or prohibited contract after it has been wholly or partially performed? What is the true distinction between the strictly private corporation and the so-called "quasi-public" corporation in this respect?

Again, in what sense, if in any sense, is the property of a corporation a trust fund for the payment of creditors? Is a stockholder, who has not yet paid the instalments on his shares, entitled to set off against the corporation's claim, a debt due by the corporation to him? If not, (and it has been decided by high authority that he is not so entitled),¹¹ what is the true ground upon which to base the denial of his right? Can a corporation prefer its creditors? Is MORAWETZ right

¹⁰ 79 Hun. 51.

¹¹ *Sawyer v. Hoag*, 17 Wall. 610.

in contending that a preference is in conflict with principle?¹⁰ Or, is it true that until an insolvent corporation gets into the hands of a court of equity, it has the same power of disposition over its assets as if it were a natural person?¹¹ If a preference in favor of a general creditor is permitted, is the rule the same where that creditor is also a stockholder? If the preference is permitted in favor of a stockholder, what is to be said of a case in which the preferred creditor is a director?¹² Can an unsecured creditor file a bill in equity against the stockholders of a corporation without first obtaining a judgment at law, calling upon them to pay the instalments which remain unpaid upon their stock? If not, (and the Supreme Court of the United States has decided that a creditor has no such right,)¹³ how can the court consistently continue to assert that the capital stock of a corporation paid and unpaid is affected with a trust in favor of creditors?¹⁴

No decisions are more interesting than those decisions of the Supreme Court of the United States, in which during the last five years that august tribunal has discussed the questions which fall under the last two heads just referred to—"Corporate Power" and the "Rights of Stockholders and Creditors in the Property of the Corporation." It is proposed to take a brief survey of the most important recent decisions of the court which deal with these problems.

I. CORPORATE POWER.

The five-year period, which has been arbitrarily selected for examination, may be said to be marked in its beginning by the decision in *Central Transportation Company v. Pullman's Palace Car Company*,¹⁵ which was argued in January, 1890. The decision in that case is well known to the profession. A corporation was organized under the general manufacturing

¹⁰ § 803.

¹¹ *Graham v. R. R.*, 102 U. S. 148; *Hollins v. Brierfield, etc., Co.*, 130 U. S. 371.

¹² *Re Wincham Co.*, L. R. 9 Ch. Div. 322; Opinion of JAMES, M. J.

¹³ *Hollins v. Brierfield Co.*, 130 U. S. 371.

¹⁴ *Case v. Beauregard*, 99 U. S. 119.

¹⁵ 139 U. S. 24.

corporation law of Pennsylvania, and the purpose of its incorporation was stated to be "the transportation of passengers in railroad cars constructed and to be owned by the said company" under certain patents. The Pullman's Palace Car Company was desirous of obtaining a lease of all the cars of the Pennsylvania corporation, and, in order that all doubt as to the right of the latter to make such a contract might be removed, application was made to the Legislature for a special act, which extended the period of corporate existence for a term of years, authorized an increase of its capital stock and expressly empowered it "to enter into contracts with corporations of this or any other state for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property." Eight days after the passage of this act the lease was executed, and for some sixteen or seventeen years the company lessee paid the stipulated rental when and as the same became due. The company lessee, at the end of a nine months' period for which no rental had been paid, refused to pay upon the lessor's demand on the ground that the contract of lease was unauthorized and, therefore, unlawful and void. In this position the lessee was sustained by the Supreme Court of the United States, Mr. Justice GRAY delivering the opinion. He adopted the view that the corporation lessor, originally a strictly private corporation organized like large numbers of others in Pennsylvania under the general manufacturing corporation law, became a quasi-public corporation with public duties to perform in virtue of the special act, which increased the duration of its corporate life and authorized an increase of its capital stock. The corporation being, in this view, a corporation with public duties to perform, it could make no lease of its property without legislative consent; and he voiced the opinion of the court to the effect that the legislative authority to make a lease could not, in this case, be construed to authorize a lease of all the property of the corporation, since such a contract would involve the abdication by the corporation of the powers which it possessed, and the cessation by it of the performance of the duties imposed upon it by law. Having decided that the contract of lease was

"unlawful and void, because it was beyond the powers conferred upon the plaintiff by the Legislature," the court decided that no performance on either side could give the unlawful contract any validity or be the foundation of any right of action upon it. "Whether this plaintiff could maintain any action against this defendant in the nature of a *quantum meruit*, or otherwise, independently of the contract need not be considered, because it is not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums, which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above cited, the defendant is not liable for." Mr. Justice GRAY thus states the reason for the rule, which is applied in this case: "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either."

It is clear from this opinion that the Supreme Court of the United States must have worked out a theory of its own as to the distinction between a strictly private and a quasi-public corporation. It is not to be supposed that the court would have decided that a company organized under a general manufacturing corporation law was a quasi-public corporation with public duties to perform had the special act of Legislature been absent from the consideration. That act of Legislature contained but three provisions. The provision authorizing a lease may be disregarded. It certainly could not be relied upon as indicating a legislative intention to turn a manufacturing company into a quasi-public corporation, because the power to lease is confessedly inconsistent with the nature of a quasi-public corporation and special permission

must be obtained from the sovereign, in order to give the contract validity. It must be, therefore, that the Supreme Court of the United States holds to the view that an increase in the term of existence of a manufacturing company or a permission to increase its capital stock, or both elements conjointly, will be sufficient to work the change. But suppose that the lengthening of the corporate life and the increase of the capital stock had been authorized by a general law applicable to all manufacturing corporations; is it to be supposed that all the manufacturing companies in the state would then have become quasi-public corporations without power to lease their plants? Such a conclusion would never be reached by any court. Are we to suppose, then, that the transformation in this case was wrought in virtue of the circumstance that the enabling act was a special and not a general law? No reason occurs to the writer why any significance should be attached to the distinction; and yet there is no escaping the conclusion that somewhere within the compass of this short and commonplace act there is contained the provision which creates a new relation between the corporation and the public, which gives to the public an added interest in the performance by the corporation of its functions and imposes upon the corporation new and more serious duties to perform. The practical conclusion is that manufacturing corporations must beware of legislation enacted for their benefit, as it is not yet clear what language will bring about a state of things that is not in the contemplation of the Legislature which enacts the law, nor of the corporation which accepts it.

Assuming the corporation to be a quasi-public corporation, there was abundant authority for the proposition that the lease, to be valid, must receive legislative sanction. Some years before, in *Thomas v. Railroad Company*,¹⁰ the law upon this point was definitely settled by the Supreme Court. It is interesting to note, however, that even this conclusion was questioned by no less distinguished a jurist than Mr. Justice BRADLEY. In *Pennsylvania Co. et al. v. St. Louis, Alton &*

¹⁰ 101 U. S. 71.

Terre Haute R. R. Co.,¹⁰ decided about five years earlier than the case under discussion, he filed a dissenting opinion, in which he made a powerful statement of the reasons why the English notions on the subject of railway leases are inapplicable to our situation and circumstances, "however well suited to that compact and homogeneous country." That was a case, in which the company lessor had full authority to make the lease, and the invalidity of the contract depended upon the lack of power on the part of the lessee to accept it. Mr. Justice BRADLEY's language is general, however, and applies equally well to cases, in which there has been no specific grant of authority to make the lease on the part of the lessor. His position substantially was that the interests of the public are, as a rule, better subserved by a system of railway leases by which continuous lines for the transportation of passengers and freight are secured, than would be the case if transportation across the continent could be obtained only by means of successive independent lines of railway. It will be observed that he confined his remarks to *leases*. There is nothing in his opinion, which would justify the criticism that he loses sight of the principle that a franchise to run a railroad is a personal privilege in the sense that it cannot be sold or transferred absolutely without legislative consent. Four years before, in *Branch v. Jessup*,¹¹ which was a case of out-and-out sale, Mr. Justice BRADLEY had said: "We do not mean in the slightest degree to disaffirm the general rule that a corporation cannot dispose of its franchises to another corporation without legislative authority. But we think that the authority clearly existed in this case."

It seems, however, in spite of Mr. Justice BRADLEY's vigorous expression of opinion that the Supreme Court makes no distinction between a lease and an out-and-out sale. Both require legislative sanction as a condition of validity wherever the leasing or selling company is a quasi-public corporation. Just why the Act of the Pennsylvania Legislature in the case under discussion fell short of what is required in such

¹⁰ 118 U. S. 390.

¹¹ 106 U. S. 468.

cases is not clear to the writer. Mr. Justice GRAY speaks of the "evident purpose" of the Legislature in passing the statute and says, in effect, that a general power to lease cannot be construed to authorize a general lease, "without much clearer expressions of the legislative will looking towards the end than are to be found in this statute." This, however, is probably a question of original apprehension, and is, therefore, one of those points, which it is not profitable to discuss.

The position definitely taken by the court in the matter of the inability of a plaintiff, who has performed an unauthorized contract, to recover upon it from the defendant, is a position full of practical and speculative interest. In his dissenting opinion, already quoted, Mr. Justice BRADLEY, in the earlier case, had said: "The contract has been performed on the part of the lessor company and the lessee, and its guarantors have enjoyed the benefit of it. With what face can they now refuse to pay what they agreed to pay? With what face can they plead incapacity to contract? This is not a suit to compel the specific performance of the contract in future; but to compel the payment of the money earned by past performance of the contract. It seems to me that the companies concerned are estopped to deny their liability to make this payment." He was speaking of a case, in which the corporations which desired the benefit of a lease had formed a straw corporation to accept it, and had guaranteed the payment of the rentals accruing to the lessor. The court held, in that case (after deciding that the straw corporation had no authority to accept the lease,) that the covenants of guaranty were covenants to insure the doing of a thing itself invalid, and were, therefore, unenforceable. When a petition for a re-argument was filed the court refused to hold that the contracts of guaranty were in substance original covenants to pay rent, the guarantors being the promoters of the lease and being, in effect, the original lessees. Although Mr. Justice MILLER, in form dealt with the case as an ordinary case in which the original party in interest was the lessee named in the lease, it seems in reality difficult to distinguish the case from *Central Transportation Company v. Pullman's Palace Car Company*,

excepting with reference to the fact that in the earlier case it was the lessee corporation which was incompetent to make the contract, and in the later case it was the lessor who lacked the power. It should seem that Mr. Justice BRADLEY's protest was as applicable in the latter case as in the former. Mr. Justice GRAY, however, spoke with no uncertain voice. In addition to the passage from his opinion which has already been quoted, it is interesting to notice the following extract: "A contract *ultra vires* being invalid and void, not because it is in itself immoral, but because the corporation by the law of its creation is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties so far as could be done consistently with adherence to law by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money, which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract." The distinction between recovery under an express contract, which the court, in this case, refused to permit, and a recovery of the amount sued for under an implied contract, which is permitted in many cases, and is not disapproved by Mr. Justice GRAY, is a distinction, which is somewhat shadowy and difficult to grasp. Why it is that the interests of the public are best subserved by treating the contract as made by the parties as unenforceable and substituting an enforceable contract "implied by law" to accomplish the same result is not clear to the writer. Mr. Justice GRAY's language just cited seems to contemplate a recovery in quasi-contract in the original suit as if the court were dealing with the case of a defendant in default under an illegal agreement. But this cannot be the basis of a recovery in any case like the one before the court, because the rule of law, which invalidates a railway made without legislative authority, is, in no sense, a

law which exists for the protection of the plaintiff against the defendant, and the parties to the unauthorized contract are accordingly to be treated as *in pari delicto*. In such cases, it well settled that the plaintiff cannot recover in quasi-contract.²¹ It should seem, therefore, to be a necessary inference from the language of the court that a recovery will be permitted (in cases where a recovery is permitted) on the ground that there is evidence in the case from which an intention upon the part of the defendant to pay may fairly be inferred. In other words, the relief is granted to effectuate the intention of the parties, and not contrary to the intention of the defendant. If this is the true theory of the relief, it is hard to see (as suggested above) why the agreement of the parties should not be enforced upon the basis of the instrument in which it was expressed, instead of upon the basis of an inference from the conduct of the parties induced by the execution of that instrument. The only answer which disposes of this difficulty involves us in a difficulty equally serious. It may be said that the court in refusing to enforce the agreement as written intends to permit a recovery only in those cases in which property or money has actually passed to the defendant on the faith of the unlawful contract and subsists in the hands of the defendant at the time of suit brought. But, if we have left the realm of quasi-contract, and if the basis of relief is a genuine agreement inferred by law from the conduct of the parties, why limit the recovery to cases in which there has actually been an unjust enrichment of the defendant at the expense of the plaintiff? And why not extend the relief, in accordance with the true intention of the parties, to cover the case in which it was evidently, at the outset, the intention of the plaintiff that he should be paid and the intention of the defendant to pay him, although, as affairs have turned out, the defendant has, in fact, derived no benefit from the contract, but has incurred a loss? If this view had been adopted by the court, in *Pennsylvania Co. et al. v. St. Louis, Alton & Terre Haute R. R. Co.*, (*supra*), and, if, in that case, the court had regarded the sub-

²¹ See *Karner on Quasi-Contracts*, page 267, et seq.

stance of the transaction instead of the form, a recovery would have been permitted upon the ground that the real defendants (in form the guarantors) had purchased from the plaintiff a business opportunity to make a profit under a railway lease, for which opportunity it was evidently the intention of both parties that the defendants should, at all events, pay. The mere circumstance that the expected profit was not fully realized should not deprive the plaintiff of his right to recover on the agreement implied from the conduct of the parties, nor deprive him of his right to give in evidence the unenforceable lease for the purpose of proving the valuation placed by the parties upon the opportunity afforded by the plaintiff to the defendants. Even, if the court were to refuse to permit a recovery to this extent, surely upon the theory of a contract inferred by law from the conduct of the parties, a recovery should be permitted in such a case as the one under discussion. In *Central Transportation Co. v. Pullman's Palace Car Co.*, there was an actual enrichment of the defendant at the expense of the plaintiff. The defendant had used the plaintiff's property and had made a profit out of it. Is it possible that the defendant, on account of the unlawfulness of the contract, can retain the advantage which he has obtained at the expense of the plaintiff? The answer of the court is that, for the purposes of a suit founded upon the unlawful contract, the response to this question must be in the affirmative, unless the advantage is money or tangible property, which has actually passed from the hands of the plaintiff into the hands of the defendant. The court then proceeds to intimate that it is an arguable question whether a recovery could be had in an independent suit "upon the *quantum meruit* or otherwise." Since it is clear that no recovery can be had upon a quasi-contractual obligation, and, that, if a recovery is to be permitted at all, it is upon the basis of a genuine contract, it should seem to be purely arbitrary to permit a recovery in the original suit in some cases and to drive the plaintiff to an independent suit in other cases; and, in general, to refuse in any form of action to enforce the contract which the parties have made, substituting for it a contract which the parties did

not make, and enforcing that. In fine, it is difficult to understand, upon principle, how it is, in any cases of this class, that the court can avoid the conclusion that the contract must be enforced as it was made, or else that the parties must, in all cases, be left in the position in which they have placed themselves.

If this dilemma were recognized as sound, it is conceived that it would not be long before the Supreme Court of the United States would adopt what is conceived to be the modern view of unauthorized, and even of prohibited corporate contracts—namely, that they will be enforced as between the parties to them precisely as if they were the contracts of natural persons. The term *ultra vires* would have, in that event, no significance except in the case of suits in equity by stockholders to restrain the making of contracts, or in *quo warranto* proceedings instituted by the state in cases where such unauthorized or prohibited contracts have been actually made.

It should seem to be clear from the language of Mr. Justice GRAY, in *Central Transportation Co. v. Pullman's Palace Car Co.*,²² that it is the legal duty of a corporation, which is a party to an unauthorized or prohibited contract "to rescind and abandon the contract at the earliest moment, and the performance of that duty, though delayed for several years," is "a rightful act when done." If, in the case discussed above, the lessor, before the defendant had made default in the rentals, had notified the defendant of his disaffirmance of the contract, it should seem that he would have been doing no more than his duty, and that he would have been entitled to recover from the lessee in quasi-contract for the benefits conferred upon the defendant under the lease. It will be observed that in such a case the suit would not be instituted to recover compensation from the defendant or to recover the equivalent of what would have been received if the invalid contract were completely executed. The plaintiff would be seeking to be reinstated in his former position by a return of the property,

²² Page 55.

which is the subject-matter of the contract.²² In such a case, the inquiry is not as to whether the parties are *in pari delicto*, but as to whether the illegality of the contract is in the nature of *malum in se* or *malum prohibitum*.²³ Assuming for the purposes of this discussion that there is a real distinction between *malum in se* and *malum prohibitum*, it is clear from Mr. Justice GRAY's opinion that an unauthorized railway lease is *malum prohibitum* merely. The right of the lessor to recover, therefore, would seem to be undoubted. The standing of a plaintiff in such a case was emphatically recognized in *Congress Spring Co. v. Knowlton*,²⁴ which carries the doctrine of the plaintiff's right to a recovery under an illegal contract somewhat farther than any other case in the books. It is difficult to understand, therefore, the meaning of the decision of the Supreme Court in *St. Louis, Vandalia & Terre Haute, R. R. Co. v. Terre Haute and Indianapolis R. R. Co.*²⁵ In that case a railway lease had been made by plaintiff to defendant, and for a term of sixteen or seventeen years the defendant had been in possession under the lease and had paid rental in accordance with its terms. At the expiration of that period, but long before the end of the term, the plaintiff lessor filed a bill in equity to set aside and cancel the lease on the ground of illegality and prayed for a return of the property. The Supreme Court held under the decision in *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute, R. R.* (*supra*), that "the contract in question was *ultra vires* of the defendant, and therefore did not bind either party and neither party could have maintained a suit upon it at law, or in equity against the other." Mr. Justice GRAY delivered the opinion of the court, and after using the language just cited, he remarked: "It does not, however, follow that this suit to set aside and cancel the contract can be maintained." He proceeds to announce that "the general rule, in equity, as at law, is *in pari delicto potior est conditio defendentis*; and therefore neither

²² See *Kerner on Quasi-Contracts*, page 260.

²³ *White v. Franklin Bank*, 22 Pick. 181.

²⁴ 103 U. S. 49.

²⁵ 145 U. S. [1891].

party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted at law or in equity unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party, and the protection of the other, or where there has been fraud or oppression on the part of the defendant: *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; *Story Eq. Jur. Sec. 298*." Again he says: "When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract: *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284." The opinion of the court was that since the lease was invalid and the parties *in pari delicto*, and since the contract had been fully executed on the part of the plaintiff, by the transfer of its property to the defendant, who had held the property and paid the stipulated consideration for seventeen years, the court would not grant the relief prayed for by the plaintiff and would take no steps to compel the return of the property by the defendant.

Surely there is abundant food for reflection in this decision. The conclusion is precisely the reverse of what the language of the court in *Central Transportation Company v. Pullman's Palace Car Co.*, would lead a lawyer to expect. If there really is a duty upon the part of a party to an invalid contract, wholly or in part executory, to take active steps to rescind it at the earliest possible moment, it is difficult to see why the court should not be active in effectuating a performance of the duty. That there is a duty upon the part of a corporation which has become party to an unauthorized delegation of corporate franchises to endeavor to re-establish the *status quo* in favor of an injured public, is a conclusion that seems to follow logically from the premises recognized by the court. Is it

possible that the Supreme Court of the United States means to deny the proposition that a party to an illegal contract, not wholly executed, may give notice of disaffirmance to a defendant who is not in default and recover from the defendant such property as will result in putting both parties in the position in which they were before the illegal contract was made? It should seem that the right is clearly recognized, as already stated, in *Spring Co. v. Knowlton*, (*supra*), and it is not denied in any of the cases cited by Mr. Justice GRAY in support of his conclusion. In some of those cases, indeed (as in *Thomas v. Richmond*), a recovery was refused, but that was the case in which the defendant was in default under an illegal contract, and the plaintiff was declared to be *in pari delicto*; but where the defendant is not in default and the illegality of the contract is *malum prohibitum* merely, a mass of authority supports the proposition that the plaintiff is entitled to the aid of the court to make his disaffirmance of the contract effectual.²⁷ In the case under discussion an obligation existed, by the terms of the contract on the part of the defendant, in favor of the plaintiff, to continue the payment of rental for a long term of years. The court intimates that if the defendant were to refuse to pay, and (as in the case of *Central Transportation Co. v. Pullman's Palace Car Co.*), were to make default under the contract, the plaintiff would have no standing to sue upon the lease for the unpaid rental. In other words, the position taken in the last-mentioned case is reaffirmed. But if this is so, one of two results must follow: either, in the event of a default on the part of the defendant, the court will refuse to permit a recovery by the plaintiff on a *quantum meruit*; or the court in such a case would permit the recovery. If the former alternative is adopted, a question left unsolved in the earlier decision must be taken to be settled against the right of the lessor. If the latter alternative is adopted, then the decision under discussion is in substance a decision which permits the continuance of an illegal arrangement, under which the plaintiff may have the aid of a court to enforce a claim against the defendant in case the defendant should ever make default. In other words, the

²⁷ See *Kosher on Quasi-Contract*, p. 258, et seq.

court announces that the making of an unauthorized lease is invalid and that it is a menace to the welfare of the public. When the plaintiff desires to terminate it, the court refuses to lend its aid to effectuate the rescission. When, ultimately, the defendant makes default and refuses to pay rental for the period of occupation the court permits a recovery, not, indeed, upon the express contract, but upon a contract implied. Either conclusion is unsatisfactory, and it may be suggested with deference that the decision is ingeniously contrived to work to the disadvantage of the public and the plaintiff if one alternative is adopted, and to the disadvantage of the public and the defendant if the court accepts the other.

If the result of these decisions were to be summed up in a series of propositions, it is conceived that those propositions would be somewhat as follows:

Where an unauthorized corporate contract has been made, neither party can maintain an action upon it against the other.

If one of the parties does institute an action upon the contract against the other, the court, while declaring his action unfounded, will award to him a recovery in that suit of money or property obtained from him by the defendant upon the faith of the contract.

If the claim of the plaintiff cannot be treated specifically as a claim for property or money obtained by the defendant on the faith of the contract, he can recover nothing in the original suit upon the express contract.

If the defendant has received any other benefit under the contract, it is doubtful whether or not the plaintiff will succeed in a suit against the defendant founded upon a *quantum meruit*.

If the suit upon the *quantum meruit* cannot be maintained, the lessee under an unauthorized railway lease has the lessor at his mercy to the extent that he may elect to terminate the lease at any time, and, upon returning the subject-matter, may refuse with impunity to make compensation to the plaintiff for benefits received from the use of it.

If the suit upon the *quantum meruit* can be maintained, the

lessee in such a case, nevertheless, still has the lessor at his mercy in the sense that the lessor is powerless to effect a rescission of the contract when it becomes to his interest to do so, whereas the lessee may terminate the agreement at any time upon making compensation for the use of the demised property up to that time.

It seems impossible, at this stage of the development, to formulate any intelligible proposition in respect of the distinction recognized by the court between a strictly private and a quasi-public corporation.

(To be continued in a subsequent number).

THE EXEMPTION OF THE PRIVATE PROPERTY OF THE ENEMY FROM CAPTURE IN A MARI- TIME WAR—A THEORY OF INTERNATIONAL LAW.

By WILLIAM S. ELLIS.

In early times, before the association and intercourse of individuals had brought civilization to the level at which it is familiar to us to-day, and before the development of national life had forced a realization of the necessity of formulated rules to govern various peoples in their relations with one another—in other words, before International Law as a science sprang into existence—it was the custom for a belligerent to seize and appropriate all the property of an enemy state, or of its subjects, no matter of what kind it might be, or in what place or under what circumstances it might be found. The wars of the middle ages were attended by a ruthless destruction of all the property of a conquered people that the victorious invader could not carry away, and a belligerent resorted to every means at his command to cripple the resources of his enemy. States once involved in war found themselves controlled and restrained by no rule or custom, except perhaps, that of extending protection to the persons of ambassadors and

heralds, and even a violation of the sacred character of these representatives usually failed to call down upon the offender the wrath of neutral powers. The wars of those days were fought to the bitter end, and every citizen of a belligerent state considered himself and was regarded as an enemy, and as such liable to the uncertainties of a hostile position. Not only on land, but also at sea, every advantage was taken of a victory, and very little investigation was made as to the ownership of goods found lying in the hold of a prize. The exemption from seizure of neutral goods on an enemy's ship was not known, and vessels the property of some neutral state, were frequently captured if suspected of containing the goods of the enemy, whether contraband of war or not.

But with the advance of civilization and growth of commerce this reckless warfare began to be condemned, and from more than one motive states gradually allowed themselves to accept certain restraints upon the conduct of their armies in the field and their fleets on the sea. From that time until the present day contests between hostile nations have been growing less and less severe. The needless destruction, or even seizure, of goods belonging to a non-combatant member of an enemy state by an invading army is frowned upon to a greater or less extent, and the question is even generally discussed in modern times whether it would not be wise to adopt, as a principle of the law of nations, the custom of exempting from capture the goods found on the ships of the enemy but belonging to private individuals of their state. The writers upon the subject bring arguments of great force and learning to bear upon either side, the continental jurists being almost unanimous in favor of the adoption of the policy of exemption, while the English are equally desirous of retaining the old custom. The American students of International Law incline to the English view.

Before attempting to determine which is at once the most justifiable and practical course for nations to adopt with regard to this question, it is well to examine briefly the history of the theory and observe the practice of the most enlightened states of modern times.

Mr. Hall, in his work on "International Law," has the following: "That the rule of the capture of private property at sea has, until lately, been universally followed, that it is still adhered to by the great majority of states, that it was recognized as law by all the older writers, and is so recognized by many later writers, is uncontested. A certain amount of practice, however, exists of recent date, in which immunity of private property has been agreed to or affirmed." As the instances of the recognition of states, in both early and recent times, of the right to capture private property at sea are too numerous to mention, we will confine ourselves to the consideration of the opposite practice, all of which, as Mr. Hall says, is of recent date.

During the presidency of Mr. Monroe, the United States proposed, through a circular letter to the governments of France, England and Russia, that "merchant vessels and their cargoes belonging to subjects of belligerent powers should be exempted from capture by convention." This was in 1817, Mr. Adams being, at that time, Secretary of State. The proposal was accepted by Russia in principle, but Russia determined that, unless it should be accepted by the maritime states in general, she would not act upon it. The refusal of England to accept even the principle is not to be wondered at, but it is not so easy to perceive the motive which actuated France in adopting the same policy.

The Declaration of Paris of 1856 abolished privateering by a clause inserted by the negotiators without instructions from their respective governments, but which obtained their unqualified approval. Mr. Marcy was then Secretary of State under President Peirce, and when his accession, and that of the United States was sought by the European powers, he refused on the ground that it was a "cardinal principle of national policy that the country should not be burdened with the weight of permanent armaments. The right of employing privateers must be retained unless the safety of the mercantile marine could be legally assured." But he offered to concede this point if it were conceded in return that the private property of the subjects of one or other of the two billig-

crents engaged in a maritime war should not be subject to capture by the vessels of the other party, except in cases of contraband of war."

In 1870 Mr. Fish, Secretary of State, declared to Baron Gerolt that it was his sincere hope that the government and people of the United States may soon be gratified by seeing the principle of the immunity of private property at sea universally recognized "as another restraining and humanizing influence imposed by modern civilization on the art of war."

This principle, which Mr. Fish was so anxious to uphold, he had the good fortune to see put into practice to some extent, through a treaty with Italy in 1871, by which it was stipulated that private property should not be taken possession of or destroyed except for breach of blockade or as contraband of war. Italy had already shown its own disposition in a decisive manner. In 1865 Italy had passed a marine code, according to which all merchant vessels of a hostile nation should be exempt from seizure or molestation, provided, only, that reciprocity should be observed between the two states.

On the outbreak of the war of 1866, Austria and Prussia declared that enemy ships and cargoes should not be captured so long as the enemy state granted a like indulgence, and this was religiously practiced, the war being carried on from beginning to end, both as between Austria and Prussia, as well as between Austria and Italy, without the resort to maritime capture.

The most recent case is that of Prussia, in 1870, when the Prussian government issued an ordinance exempting French vessels from capture without any mention of reciprocity.

These seven examples make up the sum total of the practice to be found in favor of the doctrine of exemption, and in studying them we are forced to the conclusion that they cannot be accepted as *bona fide* declarations of international sentiment. For, in the first place, the view taken of the case by the United States in 1856, by Italy in 1865, by Austria in 1866, and by Prussia in 1870, was very strongly influenced by the fact that each of those states was, at the time, in possession of a weak navy and utterly unable to compete with

nations of maritime supremacy. In the second place, even this small amount of practice is of quite recent date, extending only over a period—if we except the case of the United States under President Monroe—of half a century.

There have been, at various times and in various states, conventions held for the purpose of drawing up resolutions for presentation to their governments, urging the necessity of accepting the new doctrine. But an examination of these petitions of citizens, whose sole idea, apparently, is to foster the humanizing influence of the law of nations and mitigate the hardships and privations of war, reveals the fact that they have usually arisen from the same selfish motives which actuated the states of maritime inferiority to plead the new cause, and that the members of these conventions have, in nine cases out of ten, been the leading merchants and shippers of their country. Perhaps the most noted convention of this character was that held at Bremen, in December, 1859, which M. Bluntchli refers to as "an indication of the modern feeling with regard to the question of exemption." A more recent instance, and one which arose from very different motives, was that of St. Petersburg, in 1874, from which Prince Gortshakoff addressed a circular letter to the other European powers proposing, on behalf of Russia, to form an international code to ameliorate the conditions of war, etc. Lord Derby refused to join, "seeing the ulterior designs" of the Russian Minister, whose plan it was to emphasize the power of the great military nations and reduce whatever influence the maritime states possessed. Thus each of these statesmen contended for a principle which promised the best results for his country; the desire to put into practice an advanced theory of international law was as far from the mind of the Englishman as from that of the Russian.

Since it is thus so difficult to perceive from the limited practice just what the effects of the new doctrines have been, and since the views of congresses and conventions have invariably been of a selfish rather than of a broad international character, it remains to be considered whether or not there is a sound reason for adopting the policy of exemption from either a legal or a moral point of view.

The argument advanced by the continental jurists is, that war being "a relation of a state to a state," and not of an individual to an individual, it results that no individual should suffer because he happens to find himself the perhaps unwilling member of a belligerent community with whose quarrel he may have no sympathy. This doctrine is assumed by Bluntchli as a matter of course, and he thus speaks of it in his chapter on the "*propriété privée de l'ennemi* : "

"*Bien que la guerre maritime soit dirigée contre l'état et non contre les particuliers, et que l'on doive en droit naturel respecter la propriété privée sur mer aussi bien que sur terre, plusieurs puissances maritime (and here he refers especially to England, of course) reconnaissent encore aujourd'hui à la marine de guerre le droit de saisir et d'amener les navires qui sont la propriété de ressortissants de l'état ennemi, et de confisquer les marchandises trouvées à bord de ces navires.*" Bluntchli then goes on to say that the merchants of an enemy state are no more the enemies of a hostile maritime power than of a hostile continental power, and that the former should respect the rights of private persons just as much as the latter.

The above arguments are brought out in a forcible manner by M. Desjardins and M. Laveleye, and M. Calvo has made strenuous efforts to induce his own and other governments to adopt the "modern and more civilized course."

Thus two assumptions form the basis of the arguments of the continental jurists: (1) That war is exclusively a relation of a state to a state, and (2) that the private property of an enemy is exempt from capture in a continental war. Can these assumptions be supported?

International law takes cognizance of individuals only through their state, the state being the "person" subject to the dictates of that law, and consequently the fortunes of an individual, all indissolubly linked with those of his state, come what may. The individual has no personal, no proprietary rights, except as a member of his state, and while in times of peace, he claims and enjoys all the advantages of citizenship, so in time of war he must bear his share of the responsibility and, perhaps, of the misfortunes of his country, and this, although

he may not approve of the war itself or the cause for which it is waged. Portales, who borrowed his views on the subject from Rousseau (although generally credited with being their originator), maintains that the "private individuals of belligerent nations find themselves enemies by *accident*; they are not so as men, they are not so as citizens, they are so only as soldiers." His idea evidently is that when a state declares war its army should be composed only of those who actively sympathize with the cause, instead of being drawn from the general mass of the people; a very attractive theory, no doubt, and one which at some distant day may be recognized and accepted by the most enlightened state; but it must be confessed that thus far little evidence has appeared of its being put into practice. On the contrary, the armies of a belligerent are usually composed very largely of soldiers, who fight from motives of much lower order than the national cause, or who have been forced into the ranks.

Thus it is impossible to reconcile the various positions, in which an individual finds himself with regard to the government whose protection he claims with the theory that war is a relation of a state to a state. It is far more reasonable to admit that citizens are merely portions of their states, and as such liable to the chances of their good or bad fortune. There is then no reason, from a legal point of view, to exempt the owners of merchandise from subjection to the loss of their goods embarked with the knowledge of the risk to which they may be exposed.

But, laying aside the legal aspect of the question and considering it from a moral, and at the same time, practical point of view, is there any real reason for regarding the seizure of private property at sea as incompatible with the modern standard of justice and humanity, or as of too great severity in comparison with the other measures of war?

"In the battles and campaigns of a (land) war," says Mr. Dana, "exigencies are constantly arising authorizing or even requiring the destruction or, at least, the seizure of all kinds of property." In a hostile country an army must necessarily subsist upon the provisions and resources of the enemy. But

An examination of this character can scarcely fail justly to produce most unfavorable impressions of the witness.

Again, it is sometimes judicious to compel him to exhibit his own unworthiness of belief, by bringing before him direct and unequivocal contradictions in his testimony, and then ask him to explain and reconcile them if he can. I have seen a witness struck dumb by this mode of cross-examination; and, in many cases, it is much better thus to present it, than to reserve the contradiction for after discussion; it is fresher, fairer, more candid and more efficient.

Before you venture upon the trial of a capital case, be well assured in your own mind that you are competent for the hazardous duty you are about to assume. Remember the blood of the defendant may be upon you if your task be feebly performed, and do not, therefore, allow a feverish desire for *premature* notoriety, in a case of great popular excitement, to blind you to the difficulties and dangers by which you will be inevitably surrounded. The trumpet of fame cannot drown the small still voice of remorse.

Being well assured that you are able in point of intellect and knowledge, be equally well convinced that your feelings are deeply enlisted for the hapless being you are called upon to defend, and that these feelings, instead of impairing your efforts, will contribute to strengthen and enforce them. You should feel as though you were defending yourself, which you will naturally do by constantly holding in view the life of the prisoner, the gibbet, and his forlorn and heart-stricken survivors.

You must know no *fear* but that of *failure*, and even *that* you must permit nobody else to discover through you. Waive no right that you possess that may affect the defendant—yield tribute to no authority that is illegitimately exerted to his injury—recollect you guard the citadel of human life—be wary and be firm. The judge and the jury, it is true, may *take* the life of the prisoner, but you are not to *give* it away. They must reach it over your own prostrate body.

In all you think, and say, and do, remember *your* strength is nothing. There is but *one* arm that is powerful to save,

and in relying upon that arm, you derive a support, the mere consciousness of which is both a sword and a shield in the hour of extremest peril. You may not acquit the guilty; nay, you may not acquit the innocent; but you will at least, by a firm, faithful and fearless discharge of your duty, *acquit yourself*.

I have said that manner is scarcely less necessary than matter—indeed, rightly considered, it *is* matter.

You must enter upon the trial of a capital case as a physician should enter the death-bed scene—calmly, gravely, solemnly—all eyes are upon you—all *hopes* are upon you—all *fears* are upon you. There is no time for flippancy, agitation or irresolution—much less for smiles or merriment. Sport would as well become a charnel-house.

Stand by the prisoner while he makes his challenges; advise with him, comfort him and sustain him. When you repeat his challenges, do it in a mild and inoffensive way, lest you may create *enemies*, while your chief object is to secure *friends*:

If you ever challenge for cause, and the challenge fail, be certain that you have not exhausted your right to peremptory challenge, and invariably exercise it.

Never challenge the twelfth juror, unless you are reasonably certain that he who may be called in his place will be more favorable to the prisoner.

The jury being complete, deliberately proceed to the trial of the cause. I say deliberately—no hurry—no confusion—no gossip—no levity—no divided attention—note everything with the “very comment of your soul;” and while *you* look at all, bear in mind the prisoner, and *all* connected with him, look at *you*.

If the unhappy man have a family, much as it may cost, the family should be present in the hour of his extremest need. He will suffer more, and they will suffer more, by their absence. Their presence gives a proper tone and complexion to the awful scene. It is worth a thousand fancy sketches of domestic, parental, conjugal or filial agony. When the verdict shall be returned, take your post by the

in a capital case may be aptly compared to that of a commander of a ship in a storm; the cordage snaps, the masts go by the board, the bulwarks are carried away—her hull springs a leak—every dependence, from time to time, fails, and ruin appears to be inevitable; but still, amidst the “wreck of matter,” sustained by the immortal mind, with a resolved will, the gallant commander stands by his helm to the last, determined either to steer his shattered vessel into port, or to perish gloriously in the faithful discharge of his duty.

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DAVIS v. MARKHAUSEN.¹ SUPREME COURT OF MICHIGAN.
DECEMBER 22, 1894.

Newspaper Libel—Presumption as to Malice and Retraction in their Relation to Damages.

1. In an action for libel for publishing a newspaper article stating that plaintiff was arrested for larceny, and giving the number of his residence, the publication is presumed to be malicious and evidence that another person of the same name as plaintiff was arrested does not show, as a matter of law, that defendant intended in good faith to refer to such other person and, therefore, does not relieve him of punitive damages.
2. Evidence of a retraction by a newspaper of a libellous article is admissible in mitigation of damages if published before suit is brought.
3. No presumption of law exists by which a mere retraction becomes evidence of absence of malice in publishing such libellous article.

RETRACTION OF LIBEL.

Save in the most flagrant cases, harmonious social intercourse requires that a retraction of words causing offense or injury shall be accepted as a full withdrawal of the cause of displeasure and operate as a complete satisfaction for the injury ensuing. This is especially true when the words spoken are not the result of ill-will or malice but merely due to ignorance or indifference. Socially, he would be reckoned a boor, who under such circumstances, would refuse to accept and acknowledge an apology.

With less leniency but more justice, the law recognizes that the injury due to defamation, whether wilful or through negligence, is not repaired by a retraction, that the impression made by words spoken or written is not effaced by their re-

¹ Reported in 61 N. W. 304.

call and exacts that the injury produced be fully compensated. Holding, here as elsewhere, that a man shall be held responsible for the natural consequences of his acts, and viewing libel as a necessarily voluntary act, the publisher of a libellous newspaper article is held to have intended all the mischief and injury it may produce, this intent is denominated malicious, and for this presumed malice punitive damages may be given, as well as substantial damages for the actual injury. Proof of the absence of such malice may offset the vindictive, and a retraction offset the actual damages, but the "net" injury must be satisfied, and, broadly speaking, is the balance obtained by deducting from the defamatory effect of the original publication the corrective effect of the withdrawal of the words of offense. In striking this subtle and evasive "balance" the jury acts as a board of accountants, with the instructions of the court as its manual.

In aggravation of damages evidence may be given of malice or gross negligence, of the extent of publication, the position of the parties, etc., (Am. and Eng. Ency. Law, v. 13, p. 438; Odgers on Libel, *p. 295; Newell on Defamation, p. 876), and in mitigation it is admissible to prove the absence of malice, the truth of the publication, the degree of provocation and in general all matters which tend to justify or excuse the defendant: Odgers, *p. 299; Am. and Eng. Encycl. Law, p. 439. The motive in publishing a libel will be seen to go to the very root of the question of damages. In the case of the ordinary newspaper libel, however, published either through accident or neglect, with no special motive in publishing, and followed in due season by a retraction, three questions arise, which must be answered before a jury can be said to have any safe guide in determining the amount of damages to be awarded.

1. Admitting the article to be libellous and no proof offered of absence of malice in publishing it, what is the presumption of law as to the motive of publication in its relation to damages?
2. Under what conditions does subsequent retraction affect damages?

3. To what extent is the retraction evidence of the motive of the publisher, that the original publication was without malice or for justifiable ends?

As to the first point it seems to be definitely settled that where the words are libellous in themselves, punitive damages may be given if thought proper by the jury without evidence of malice beyond the words: *Odgers*, "p. 291, n. b.; *Am. and Eng. Ency. Law*, v. 13, p. 433, n. 1. The immediate authorities cited by the case under discussion in support of the proposition that punitive damages may follow malice which, without being proved is presumed, as a matter of law, are: *Detroit Daily Post Co. v. McArthur*, 16 Mich. 451 [1868]; *Whittemore v. Weiss*, 33 Mich. 353 [1876]; *Scrapps v. Reilly*, 38 Mich. 25 [1878]; *Ass'n v. Tryon*, 42 Mich. 549 [1880]; *Bacon v. R. R. Co.*, 55 Mich. 224; 21 N. W. 324 [1884]; *Newell Defam.*, pp. 319, 321. The first case, *Detroit Daily Post Co. v. McArthur*, contains a very careful and elaborate opinion by CAMPBELL, J., in which he says: "The law favors the freedom of the press, so long as it does not interfere with private reputation or other rights entitled to protection, and, inasmuch as the newspaper press is one of the necessities of civilization, the conditions, under which it is required to be conducted, should not be unreasonable or vexatious. But the reading public are not entitled to discussions in print upon the character or doings of private persons, except as developed in legal tribunals or voluntarily subjected to public scrutiny, and since an injurious statement inserted in a popular journal does more harm to the person slandered than can possibly be wrought by any other species of publicity, the care required of such journals must be such as to reduce the risk of having such libels creep into their columns to the lowest degree, which reasonable foresight can assure" * * * "It is in connection with the various degrees of blameworthiness chargeable on wrongdoers that the discussions have arisen on the subject of vindictive or exemplary damages, which, inasmuch as they rest upon actual fault, are by some authorities said to be designed to punish the wrong intent, while, according to others, the damages usually so called are

only meant to recompense the sense of injury, which, is in human experience, always aggravated or lessened in proportion to the degree of perversity exhibited by the offender. While the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead, and we think the only proper application of damages beyond those to person, property or reputation is to make reparation for the injury to the feelings of the person injured." * * * "The injury to the feelings is only allowed to be considered in those torts, which consist of some voluntary act or very gross neglect, and practically depends very closely on the degree of fault evinced by all the circumstances. It has been very wisely left to the jury to determine each case upon its own surroundings, because the only safe rule of damages in matters of feeling is to give what, to the ordinary apprehension of impartial men, would seem proportionate to an injury, which must be measured by the instincts of our common humanity." * * * "There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is, therefore, liable, not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feelings as must unavoidably be inferred from such a libel, published in a paper of such position and character." * * * "When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor, which such carefulness would justify in mitigation of that portion of the damages which is awarded on account of injured feelings." While basing the award of vindictive damages on the ground of injured feelings rather than punishment of the author of the libel, the rule as to damages is the same. The original presumption of malice in publishing a libellous article continues until it is shown that the mischief has been done in spite of precautions, and when the defendant has shown this, it is for the jury to say to what extent it mitigates the injury to feelings and abates the punitive damages.

In general, a retraction is competent evidence in mitigation of damages if made before suit is brought and immediately following the libel. But, in order to be effective, a "retraction should be made as publicly as the charge, and, as far as possible, to the same persons; and the defendant should do his utmost to stop the further sale of the libel. It should be printed in type of ordinary size, and in a part of the paper where it will be seen, not hidden away among advertisements or notices to correspondents:" Am. and Eng. Ency. Law v. 13, p. 442; See also, Newell on Defam., p. 907; Odgers, Libel and Slan. *p. 299. The recent case of *Turton v. N. Y. Recorder Co.*, 38 N. E. 1009 [N. Y. 1894], holds that a mere offer to retract cannot be shown in mitigation of damages but inclines to the position that a retraction in good faith after action brought may, under certain circumstances, be proved in mitigation. This is in conflict with *Evening News Ass'n v. Tryon*, 42 Mich. 549, and *Bradford v. Edwards*, 32 Ala. 628. Of the proposition laid down in the present case there can be no doubt whatever. On the authority of *Storey v. Wallace*, it holds that "the retractions were not evidence of the circumstances under which the original publication was made or of the good faith of the original publication. They were admissible, their publication having occurred before suit brought, and immediately following the libel, in mitigation of damages. The language of *Storey v. Wallace*, 60 Ill. 51 [1871] is: "Equally untenable is the position of appellant's counsel that the judgment should be reversed, because the publication of retraction, under the circumstances, was an accord and satisfaction." * * * "The evidence shows that they published this retraction as a simple act of justice to the plaintiff, and not as a condition of their being discharged from liability. Its publication was a matter to be considered by the jury in mitigation of damages, and they were so instructed by the court, but it had no other bearing upon the action."

The question of presumed malice is important as affecting punitive damages. The second question of retraction is related to both actual and punitive damages. The theory by which a retraction is made available to reduce actual damages

is the very practical one that the injury caused by the original publication is to some extent mitigated by the withdrawal of and an apology for the libel: *Storey v. Wallace*, 60 Ill. 36; *Davis v. Marshausen*. The retraction being admissible at all, the circumstances and conditions under which it is made are to be given to the jury, and it is for it decide to what extent the original injury to reputation has been repaired and remedied. The relation of the retraction to punitive damages raises the third question. To what extent is the retraction evidence of the motive of the publisher, that the original publication was without malice or for justifiable ends?

On whatever theory punitive, vindictive or exemplary, damages are awarded, we have seen that they are bound up in the question of motive of publication. Absence of malice, due care and justifiable end defeats them, while either proof of express malice or the legal presumption of malice, in the absence of proof to the contrary, justifies them. Without citing many cases, *Bradley v. Cramer*, 66 Wis. 297 [1886], and *Turton v. N. Y. Recorder Co.*, 38 N. E. 1009 [1894], seem to decide that retraction may be accepted as evidence of malice, or its absence in the publication of the libel. It therefore becomes available in mitigation of punitive damages. In both these cases the court argues at some length on the subject, and admitting the retraction as evidence would pass it to the jury, but it is to be noted that it had already been submitted in evidence for this purpose.

The present case would seem to decide that unless connected with the question of motive, by something in the pleadings or proofs, a retraction has no bearing on the question of punitive damages. In the present case the defendants desired the court to make the inference that the publication of the retraction disclosed that the libel was a mere mistake and done in good faith. This was rejected by the court in these words: "The retractions were not evidence of the circumstances under which the original publication was made, or of the good faith of the original publication." The retractions, as such, were therefore held to be no evidence of motive whatever.

The wisdom of this is manifest. The "power of the press," so

much spoken of, but so seldom brought home to a person through personal attack, should be strictly guarded when it attempts to sully the reputation of the citizen, and the liability of the publisher to punishment should not be limited to the actual damage inflicted, which in some cases is very slight, by a simple retraction, made after the libel has received a wide circulation, and manifestly for the purpose of avoiding all exemplary or vindictive damages. To throw the burden of showing the relation between the retraction and the motive of publication on the defendant, rather than leave it to the inference of a jury, is simple justice, for if such a relation exists there should be no difficulty in establishing it. At the same time such a rule holds the threat of substantial punishment over the careless or negligent editor and publisher, it withdraws the consciousness of an easy escape from heavy damages by a mere formal retraction, and serves in a measure to protect the citizen from one of the greatest powers for mischief in evil hands which modern civilization has evolved.

May 20, 1895.

R. S.

DEPARTMENT OF TORTS.

EDITOR-IN-CHIEF,
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Assisted by

BENJAMIN H. LOWRY,

ALEXANDER DUBBIN LAUER,
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WELCH v. MAINE CENTRAL R. R.¹ SUPREME COURT OF
MAINE. AUGUST 17, 1894.

The plaintiff was in the employ of another who was engaged by the owner upon the work of filling up and grading a piece of land situated on the side of defendant's railroad. The defendant had made an arrangement with the owner of the land, by which the railroad company was to furnish him the dirt, with which to fill his land to the grade of the tracks and street. The dirt was loaded by the defendant's servants upon the dump-cars, owned and managed by the defendant, and conveyed from a point a short distance from the place to be graded. The business of dumping and the men, who were to engage in it, were under the direction of a conductor of the dumping train, who had also the authority to hire men, when, as he thought, his crew was insufficient for the work. This conductor requested the plaintiff employer's workmen, including the plaintiff, to assist in dumping the cars, and after the first day they did all the dumping. These facts were also known to the defendant's chief engineer, who had the entire charge of the work and made daily visits.

While so engaged the plaintiff attempted to dump a loaded car but because of its condition, of which he was ignorant, it tipped and fell upon him. This car had been disabled some hours before, and was improperly continued in the work, after having been set aside for repairs.

**EMPLOYER'S LIABILITY FOR HIS SERVANTS' NEGLIGENT INJURY
OF ONE WHO HAVING AN INTEREST IN THE OPERATION,
ASSISTS IN IT.**

In this case it was determined that "if one who has no interest in the work to be performed, a mere bystander, voluntarily assists the servants of another, either with or without the latter's request, he must do so at his own risk." And, also, "one who has an interest in the work

¹ Reported in 86 Me. 552.

to be performed, and for his own convenience, or to facilitate or expedite his own work, assists the servants of another at their request or with their consent, is not thereby deprived of his right to be protected against the carelessness of the other's servants. In the former class of cases the master will not be responsible. In the latter he will be." Three of a court of eight justices dissented, and, as no further opinion is given, their dissent must be taken to have gone to the general proposition, or even a proposition less broad, but sufficient for the decision of the case.

It is thought, first, that the above is stated too broadly for the authorities cited, and, perhaps, exceeded the intention of the court.

Second, even the proposition limited to the requirements of the decision cannot be sustained on principle.

Third, while some of the authorities cited do support the decision, they cannot be considered as well reasoned, as will be shown; and one of the cases cited is really against it.

In the opinion of the court to which the Chief Justice and two associates dissented, it is said: "It is insisted in the defence that it was the duty of the railroad company to dump Jose's earth out of the cars, and that they had no authority to employ Jose's men to assist them, and that Jose's men were trespassers in attempting to do so, and that being trespassers the railroad company owed them no duty, and was under no obligation to protect them against the carelessness of its servants." They followed the language first quoted, and instructions to the same effect were sustained.

As will be seen when the cases in its support are given, they all relate to injuries by a consignee assisting the servants of a consignor. In these cases the "interest in the work" is really the ownership of the thing to be done; and the "work" is the limit of the business of the consignor and the beginning of that of the consignee. The considerations which would make the master liable for the negligence of a servant, injuring one receiving his own property, might be very different from those where one interested merely in the general success of the operation, assists in the business purely

that of the employer, by whose servants' negligence he is injured. It was not the purpose of the court to determine the extent of the rule but merely to distinguish the position of one "having an interest in the performance of the work" from a volunteer properly so called. But where most of the cases cited arose out of this relation, and the reason stated for the proposition was only applicable to this relation, this should be made clear in the statement of the proposition.

We have next to determine whether the more limited proposition applicable to the facts and reason of the case can be supported on principle. This is whether an employer is to be held liable to one who assists his servants in their work of delivery, because of his interest as consignee or servant of consignee, and is injured by the servant's negligence.

There is no more familiar and well settled rule than that of the employers liability for his servant's negligent injury of strangers to the employment. At the same time the artificial reasons given to support the rule must certainly have lead to confusion in practice. This error consists in attempting to trace the connection between the injurious act of the servant and some personal fault of the principal who is sought to be made liable. Just as no man personally acts at his peril or is liable for all the damage he may do, and on the other hand cannot limit his liability by a lawful intention, in that extension of his person and responsibility he is not liable for all acts of his agent or servant which are made possible by the employment, nor yet is his responsibility limited by his intention or reasonable expectation. The limitation of responsibility for personal acts and that in agency are to be determined by public policy. And this is the method for securing in largest measure the ends for which the law aims. Two at least of these ends may be stated, that is, freedom of individual action and also enterprise by means of agents and the so-called personal rights. It is not meant that the exact position of public policy can be stated or is to be discovered by any process in the particular case. All that is meant is that there is a support to the rules which prevents us from referring it to a single absolute principle which is either in itself necessary or

deduced from any such primary principle. There is therefore no *a priori* reason for the rule of the master's liability, but in certain positions public policy has placed the application of the rule beyond question. In most of the cases where the master is made liable the person injured is in the exercise of an independent right, that is, receives no profit from its being conducted and takes no part in it. This was doubtless one of the considerations which influenced the minds of the courts who established the rule of coservice. It was not merely an interest in the general success, but actual placing one's self in the position of danger for the purpose of the business in whose success the injured servant was interested: *Baugh v. R. R.*, 149 U. S. 368; *Moynikan v. Hills Co.*, 146 Mass. 586; *Hedley v. Steamship Co.* [1894], App. Cases, 222; *Wilson v. Merry*, 1 H. L. Sc. 326; *N. Y. Lake E. & W. R. R. Co. v. Bell*, 112 Pa. 400.

The master's exemption has been extended to the case, where the general servant of another is hired or loaned to him for a special work, and works with his servants. Here the ultimate purpose of the general servant is to facilitate his first master's business, and his engaging in the business of the second is only subsidiary to that end. But, in law, its ultimate purpose is disregarded; coming into the position of a servant and under its peculiar risks and not in the exercise of independent rights, he is refused redress against the master for the servant's negligence: *Donovan v. Laing* [1893], 1 Q. B. 629; *Johnson v. Lindsay* [1891], A. C. 371; *Hasty v. Sears*, 157 Mass. 123; *Killen v. Faxcon*, 125 Mass. 485. In this case the question is whether the interest of the consignee in the delivery should be held sufficient to confer upon him the rights of a stranger on his own business, or place him in the position of one without such interest, a pure volunteer, or that of a special servant. It is to be admitted that the fact of interest seems to put the person in somewhat a better position than a mere volunteer. Yet such a person is not exercising an independent right, and is to be placed in no better position than a special servant, unless it is held that every servant intrusted with delivery has the authority to permit the assist-

ance of the consignees, and that, further, this would place the consignee assisting in the position of a stranger. Delivery is doubtless a matter of intention so far as passing title is concerned; but whether the manner of it will charge the consignor or consignee depends upon the one to whose servants the direction of the delivery is made. Thus in *Union Steamship Co. v. Claridge* [1894], App. Cases, 185, where a steamship company retained control over its servants who assisted the servants of the stevedores in discharging a ship of the defendants, they were held liable for the negligence of a watchman, who injured one of the servants of the stevedores. It is doubtless that the master should not be made liable to those who force themselves into his business, to say that the servants have authority to permit, is to beg the question.

It is impossible to derive any assistance in answering this question from the rule of the carrier's liability for his servant's negligent injury of trespassers. In some cases, he is said to be liable for no negligence; in some cases, only where the injury is wilful, while, in other cases, he is liable for negligence somewhat greater than that necessary to make him liable for an injury to a passenger. The rule, with regard to the negligent injury by servants of a carrier of passengers, has been made peculiar by the public nature of the business and by the quasi-surety position in regard to passengers. Much of the language used in holding the carrier liable for the servant's negligent or wilful injury of trespassers is applicable only to a personal liability of those at fault.

We will now review a few of the authorities. The facts of *Degg v. Midland Ry. Co.*, 1 H. & N. 773, is thus stated by BRAMWELL, B.: "The defendants were possessed of a railway and carriages and engines; their servants were at work on the railway in their service with those carriages and engines; the deceased voluntarily assisted some of them in their work; others of the defendant's servants were negligent about their work, and by reason thereof the deceased was killed; the defendant's servants were persons competent to do the work; the defendants did not authorize the negligence." It was held that no action could be maintained because the deceased could

place himself in any better position by his voluntary act than if he had actually been a servant. The court also said: The law for reasons of supposed convenience more than on principle makes a master liable in certain cases for the acts of his servants, not only in cases in the nature of contract, which depend on different considerations, but in cases independent of contract, such as negligent driving in the public streets, when damage is thereby done. This is a responsibility the law has put on them; there is a duty on them to take care that their servants do no damage to others by negligence in their work for their master, or compensate the sufferer where such damage is done. The public interest may require this for the public benefit; but why should a wrong doer have power to create such a responsibility and such a duty?

Four years afterwards the same rule was applied in *Potter v. Faulkner*, 1 Bert & Smith, 800. In this case the plaintiff was waiting with a "lorry" to receive a load of cotton for his master from the defendant's warehouse, and at the request of the defendant's carter, assisted in lowering a bale of cotton into the lorry of another and was injured by the negligence of the defendant's porters. The plaintiff was held to have put himself in the position of a fellow servant, and the master was not held liable. In this case the ultimate purpose of the plaintiff was to facilitate his master's business, yet this does not seem to have received any attention.

In 1887 a somewhat similar case, *O'Sullivan v. O'Connor*, occurred in Ireland, 22 T. R. I. 467. The plaintiff after purchasing some felt of the defendant with the permission of the servant, went into the loft where it was stored, to inspect the article purchased. The loft was open at one end and the plaintiff was acquainted with its construction. While unrolling the felt, and walking backwards, the plaintiff fell from the loft and was injured. It was held that in assisting the servant he was "a mere volunteer, a mere licensee." Here his interest in the purchase did not entitle him to assist the servant and impose any greater liability on the employer with regard to his premises.

The recent case of *Wischam v. Richards*, 136 Pa. 109

[1890], is against the decision in the principal case. The defendant had contracted to deliver to one B. a large fly-wheel, ten feet in diameter and weighing five thousand pounds. The wheel was brought to B.'s place of business for delivery in two sections, and was in charge of three of defendant's men. B., the consignee, made some suggestions as to proper support for the derrick and rigging which belonged to the defendant and was in their charge. The consignor then left and was absent thereafter. At the request of the defendant's man, the foreman of B. called a workman in the employ of B. to assist in the work of delivery. The plaintiff responded and by the negligence of a servant of the defendant was injured. The court said that the case was a close one, highly exceptional in its facts, and apparently without precedent. The plaintiff was held to be in the position of a fellow servant and therefore had no right to recover. As to the suggestion that the plaintiff assisted only at the discretion of his superior, which determined the mind of the lower court in removing him from the class of volunteers, the court said: "As I regard the matter, the cases teach us that it is not because the associated servant is a volunteer, that he is denied redress for the negligence of a fellow servant, but because it is the well established law of the relation between the servants whom he joins, and their master, that there is no such liability on the part of the master. Hence by joining them in their common service, he becomes, as to the master, one of them with the same rights and duties as to the master, but with no higher rights as against him. Certainly, without his consent he cannot reasonably be subjected to a greater obligation, by the act of one of his servants in engaging the service of another, than he is under to that servant." The court is not so sound in distinguishing the case at hand from that in which a consignee assists the servants of the consignor in the delivery of his own article. It is not clear why there should be any distinction; the servant's business is certainly that of his master so far as to entitle him to take part in the delivery.

The position of a mere volunteer is well settled: See also *Church v. Chicago, M. & St. P. Ry. Co.*, 52 N. W. R. 647

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 736 Broad Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

- THE UNITED STATES INTERNAL REVENUE TAX SYSTEM.** Edited by CHARLES WESLEY ELDRIDGE. Boston and New York: Houghton, Mifflin & Co. Riverside Press, Cambridge. 1895.
- THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I.** By SIR FREDERICK POLLOCK, Bart., M.A., LL.D., and FREDERICK WILLIAM MAITLAND, LL.D. Two Volumes. Cambridge: The University Press. Boston: Little, Brown & Co. 1895.
- HANDBOOK OF CRIMINAL PROCEDURE.** By WILLIAM L. CLARK, JR. Hornbrook Series. St. Paul, Minn.: West Publishing Co. 1895.
- THE INCOME TAX LAW.** Arranged with Annotations. By FRANCIS B. BRACKEN, assisted by EUSTACE GRIMER. Philadelphia: Kay & Bro. 1895.
- ADoption AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA.** By CHARLES BORGAUD. Translated by CHARLES D. HAZEN. New York: Macmillan & Co. 1895.
- HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK.** By ROBERT LUDLOW FOWLER. New York: Baker, Voorhis & Co. 1895.
- THE UNITED STATES INCOME TAX LAW SIMPLIFIED FOR BUSINESS MEN.** 3d Ed. Enlarged and Revised. By FREDERICK A. WYMAN. 1895.
- A PRACTICAL TREATISE UPON THE LAW OF JUDICIAL WRITS AND PROCESS IN CIVIL AND CRIMINAL CASES.** By WILLIAM A. ALDERSON. New York: Baker, Voorhis & Co. 1895.
- COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS.** By SEYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-III. San Francisco: Bancroft-Whitney Co. 1895.

SELECTED CASES, ETC.

- CASES ON CONSTITUTIONAL LAW.** Part III. By JAMES BRADLEY THAYER, LL.D. Cambridge: Charles W. Sever. 1894.
- AMERICA RAILROAD AND CORPORATION REPORTS, ANNOTATED.** Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.
- NATIONAL CITATIONS.** A Compilation showing all Provisions of the United States Revised Statutes. AMERICAN CITATION CO. St. Louis: Nixon-Jones Printing Co. 1895.

PAMPHLETS.

- NATIONAL CORPORATIONS.** By J. J. H. HAMILTON. Reprinted from
University Law Review.
- REPORT OF THE SECOND ANNUAL MEETING OF THE TERRITORIAL BAR
ASSOCIATION OF UTAH.**

BOOK REVIEWS.

HANDBOOK OF EQUITY JURISPRUDENCE. By NORMAN FETTER.
Hornbook Series. St. Paul, Minn.: West Publishing Co.
1895. 463 pages.

In this volume we have the sixth in order of publication of the Hornbook Series, that series of elementary treatises which has already attracted the favorable attention of the profession. The plan of the work is uniform with that of the preceding volumes and offers an admirable method of training for the student, for it gives him an analytical view of the subject under discussion, which is very apt to make a fixed impression upon his mind. The treatment of equity jurisprudence in this particular work presents a fresh appearance in the following arrangement:

Nature and Definition; Doctrines; Grounds for Relief; Property in Equity; Remedies; Reformation, Cancellation and Quieting Title; Ancillary Remedies.

This arrangement, it may be said, while lending itself readily to the treatment of elementary equity is somewhat forced. It puzzles one a little, for instance, to understand why "Reformation, Cancellation and Quieting Title" should form a general division of the work.

The author has made free use of the works of others upon his subject, though full credit seems to have been given for that use, the arrangement of "Maxims," for example, being expressly credited to Judge Phelps. There is, however, plenty of original work manifest throughout, and the relation between the text and notes is especially well balanced.

The reviewer is obliged, however, to dissent from the author upon one very important particular, and that is in his definition of equity. He defines equity as "that portion of natural justice susceptible of judicial enforcement, which was either not recognized at all by the common law or inadequately enforced by reason of its cramped procedure." Now

"natural justice" is a very misleading term, and only tends to confuse the student. The justice, which is administered in courts of law and equity, is founded almost, if not entirely, upon the rights and obligations of individuals as members of society, and is more exactly defined as "civil" justice. The definition given would also lead the student to suppose that the common law and equity divided between them definitely and enforced the whole field of natural justice, which cannot, of course, be possible. The author has followed the later rather than the earlier writers in this portion of his work and in the writer's opinion has gone astray. The Pennsylvania lawyer misses also in the chapter on the "Jurisdiction of Equity over Crimes," a reference to the article on "Equity Jurisdiction as Applied to Crimes and Misdemeanors," by the late Richard C. McMurtrie, Esq., which was published in Vol. 31 of the REGISTER AND REVIEW, page 1.

After carefully scanning the work as a whole, however, one realizes with a feeling of pleasure and satisfaction that a progressive and practical, if not profound, work has been added to the literature on this subject.

R. P. BRADFORD.

COMMENTARIES ON THE LAW OF INJUNCTIONS, as Determined by the Courts and Statutes of England and of the United States. By CHARLES FISK BEACH, Jr., of the New York Bar. Author of "Modern Equity Jurisprudence," "Modern Equity Practice," &c., &c. In Two Volumes. Albany: H. B. Parsons, Law Publisher. 1895.

The author of this work is so well and so favorably known to the profession, that his name on the title-page of a book is a sufficient guaranty of its value; and the present volume will be found in no wise to detract from his past reputation. One can but admire, also, the contrast which his brief, modest preface bears to the verbose introduction and magniloquent promises of some far less valuable if more pretentious works. The very modesty of the author is itself an assurance of the successful execution of his task.

As was to have been expected, the arrangement of the work is logical, the statements of law clear and positive, the discussion of principles carried out in full detail; but there is but little time spent in argument over controverted points. The author is content to state the law as he finds it, leaving it to the parties more closely interested to prove to the courts what it should be. This is the safer plan for the text-book writer. Theoretical discussions belong rather to the province of the essayist.

The introductory chapter, which treats of the definition and nature of injunctions, gives a very clear insight into the powers of this "strong arm of equity," and shows very plainly, by comparing it with other legal remedies, such as specific performance and mandamus, its peculiar breadth of scope and efficiency of operation, as well as its adaptability to changing and novel conditions. In this chapter the broad lines of equity jurisdiction in regard to the issuing of an injunction are plainly marked out, and the causes which will warrant the application of such a remedy concisely stated. It forms, in fact, an excellent epitome of the work.

A great deal of the matter in these two volumes is of course not new; and yet it seems new, in many instances, from the vigor of treatment. There is much, however, that is really new, arising from the peculiar conditions, social and otherwise, of the past few years. The chapter on Strikes is the most notable example of this. The application of the remedy by injunction to this phase of our social relations is of very recent date, and, it would seem, from some of the utterances of legal theorists, of still doubtful legality. But, whether theoretically proper or not, it has come to stay, and so Mr. BEACH treats it. It is not entirely clear, however, why, in an otherwise logical arrangement, monopolies should have been included under the same head as strikes, unless the author considered the former the parent of the latter, (as indeed they often seem to be.) But then it should rather have preceded than followed the other.

It is perhaps unfortunate that this work was issued so soon. If it had been delayed for a few months, it might have contained references to some very important cases, recently decided,

as to which it is now silent, and the necessary omission of which to some degree impairs its completeness. Such is the famous injunction against Debs and his followers, which broke the back-bone of the Chicago strike, and which is now before the Supreme Court of the United States on appeal from sentence for contempt for disobedience thereof; and the notorious decision in the Sugar Trust Case, which left the people of this country at the mercy of any and every monopoly. It also would have decidedly enhanced the value of the work, if the author had been able to qualify the decision of Judge Jenkins in the case of the *Farmers' Loan and Trust Co. v. N. Pac. Ry. Co.*, 60 Fed. Rep. 803, by the decision of the Circuit Court of Appeals, in the same case, on appeal from the order of the lower court, which very materially modified the latter: *Arthur v. Oakes*, 63 Fed. Rep. 310.

It is also matter of regret, in view of the number and importance of the public contracts that are annually let in this country, and of the vast opportunities for favoritism and fraud in the letting of them, that Mr. BEACH has not devoted some space to a discussion of the injunction as a remedy in such cases. There is no reference to this subject in the index; and but one case on the subject is to be found, so far at least as a cursory examination goes to show, in the work, and that crowded into a note under the head of Parties. Yet it would seem hardly controvertible, that not only may a taxpayer bring suit to enjoin a contract void on its face or illegally let, but a disappointed bidder, if also a taxpayer, may do so. The case of *Mazel v. Pittsburgh*, 137 Pa. 548, which substantiates the first of these propositions, is not even referred to.

In spite of these, and other minor defects, which lack of space forbids mentioning, the work is an extremely valuable one, fully worthy, as has been said, of the reputation of its author; and no one who uses it will find it to disappoint his expectations.

ARDEMUS STEWART.

THE LAW OF MUNICIPAL CORPORATIONS IN THE STATE OF OHIO, embracing the Statutes in force, with Forms, and Notes of the Decisions of the Supreme and other Courts of the

State relating thereto. By HIRAM D. PECK. Fourth Edition. Cincinnati: The Robert Clarke Co. 1894.

This is another of the local text-books, which the peculiar idiosyncrasies of our different state legislatures and courts have rendered necessary, to the great benefit of the book publishers and writers, but likewise to the despair of the practitioner who would keep his library reasonably complete. No question, however, can exist as to the utility of such works, under present conditions. They are absolutely essential, if the reader is to be given anything but a bare outline of the general principles of the subject; for it is impossible nowadays to present anything like a detailed statement of all the different statutes and judicial rulings of the forty-four states of the Union in any reasonable and manageable compass.

This being the case, it is evident that the prime requisite of such a work, dealing with local laws and decisions, is completeness within its limited sphere; and this Mr. Peck seems to have attained. How difficult it is to keep it complete, however, may be realized from the rapidity with which it has been found necessary to issue new editions, in order to keep pace with legislative tinkering, this being the fourth within the space of twenty years. There is a good deal of unconscious humor in the remarks of the author in his preface, that "This makes the revision complete to January 1, 1896, unless the legislature should be convened in special session."

The arrangement of the work is an excellent one for its purpose, being simply a digest of the statutes, annotated with the cases decided under them, and with forms necessary for practice thereunder. One notable innovation is to be found in the arrangement of the notes, which, instead of being numbered 1, 2, 3, &c., or a, b, c, &c., are headed with the number of the section to which they belong. This, of course; would not be practicable where, as in Pennsylvania, the statutes of each session are independent of each other, but is far preferable to any other mode of numbering, where, as in Ohio and other code states, the laws of each session are numbered according to the sections of the code. Yet a better plan

would seem to be that adopted by many annotators, of placing the notes immediately after the section to which they refer, instead of at the bottom of the page.

The audience which this work commands is of course limited by its scope; but within its sphere, it possesses great value, and is indispensable to any one who wishes to gain a clear idea of the laws governing municipal corporations in Ohio.

X.

COMMENTARIES ON THE LAW OF INSURANCE, including Life, Fire, Marine, Accident and Casualty, and Guaranty Insurance in every form, as Determined by the Courts and Statutes of England and the United States. By CHARLES FISK BEACH, Jr., of the New York Bar, Author of "Modern Equity Jurisprudence," &c. In Two Volumes. Boston and New York: Houghton, Mifflin & Co., The Riverside Press, Cambridge. 1895.

This work is in some respects different from those which Mr. BEACH has previously published. The peculiar condition of the law of insurance has made it necessary for him to depart somewhat from his usual practice, and, instead of simply stating the law as he finds it expressed in the better authorities, to give some space to the discussion of questions as yet unsettled, and to attempt to reconcile cases apparently in hopeless conflict. This has been done, as he informs us in the preface, in the precise language of the judges, whenever possible. Perhaps the most prominent examples of this are to be found in the chapters on Insurable Interest and Premiums. The work is rather enhanced in value by this circumstance; and yet one could wish that he had given his own opinions with a little more freedom and less modesty. They would in many cases be fully as valuable as the declarations of the bench.

The text is written with the author's usual clearness and directness, and presents the principles of the law on the subject in a terse and perspicuous manner. The details are not so well worked out as might have been the case if he had

devoted himself to one branch of his subject, for it is a manifest impossibility to present a complete view of the law of insurance, in all its departments, with its endless ramifications and myriad inconsistencies, within the compass of two volumes. But, with a few slight exceptions, this work contains all that is needed by the practitioner, save those minor points that are so rarely met with, but so badly needed on unexpected occasions. This is no blemish, however, and cannot be justly laid at the author's door.

Yet there are one or two matters which might have been presented with a little more fullness, and one or two more that have been omitted altogether. For instance, Mr. BEACH might have favored us with a more extended discussion of the meaning of the words "total loss" and "wholly destroyed," in reference to fire insurance; for, although stating the ruling of one court thereon, in § 1291, he omits several other important cases, that have also construed these same words.

It would also have been well, if, in treating of the law of beneficial associations, he had devoted some space to a discussion of the status of railroad relief associations, and the validity of the by-laws of such organizations, which require the dues of the members to be deducted from their pay, and make it necessary for them, before receiving benefits, to give a release to the company of all claims for damages for injuries caused by its negligence. This is fast coming to be a question of much importance, and there are a number of interesting cases on the subject.

On the other hand, Mr. BEACH has devoted a section to the discussion of the effect of what is known as a "binding slip," given by insurance brokers to the person applying, while the policy is in process of execution; has stated the rule as to the individual liability of the members of an unincorporated association for contracts of insurance made in the name of the association; has noted what is included in the term "household furniture;" and has, besides citing the Pennsylvania case, which decided that when a person at the time of being insured was already blind in one eye, the loss of the other was a total loss of sight within the meaning of the policy, discov-

ered an English case to precisely the same effect, which latter escaped Mr. Niblack's search.

On the whole, therefore, Mr. BEACH's work is a reasonably complete one, and will prove eminently useful to the profession; while the method of citing the very words of the court in doubtful and conflicting cases, will save much annoyance and waste of time in consulting the reports. Q.

Mr. JOHN A. GLENN, of Philadelphia, has prepared an edition of the UNITED STATES INCOME TAX LAW OF 1894, paragraphed, explained and digested, giving the complete text of the act paragraphed for ready reference, with an index-digest, arranged alphabetically according to subject, which will be found very useful for reference. It is published by T. and J. W. Johnson & Co., 535 Chestnut Street, Philadelphia.

INSURANCE DIGEST, 1894. By JOHN A. FINCH, Indianapolis: The Rough Notes Co. 1894.

THE INSURANCE AGENT; HIS RIGHTS, DUTIES AND LIABILITIES. By JOHN A. FINCH, Indianapolis. The Bowen-Merrill Co. 1894.

The first of these two works is a continuation of Mr. FINCH's now familiar digest, former volumes of which have been reviewed in the pages of this magazine. This (Vol. VII) brings the cases down to October 31, 1894. That the annual crop of insurance cases is constantly growing is shown by the circumstance mentioned in the preface, that, while Volume I contained two hundred and seventy-nine cases, there has been a constant increase in the number of annual decisions until the number as shown by the present volume reaches four hundred and forty-nine. The necessity for some such digest as that with which Mr. FINCH supplies the profession is, therefore, becoming more pressing every year. His work is careful and complete. The arrangement is good, and the index is all that could be desired.

The second of the two works is a little monograph of some thirty-six pages, reprinted from the pages of "Rough Notes." In it the leading cases which deal with the rights and liabilities of the insurance agent are set forth with comments and criticisms, and a successful effort seems to have been made to collect and arrange the statutory enactments of the several states, which bear upon the subject in hand. The author discusses the following questions: (1) Who is an agent of the company? (2) Classes of agents and their powers; (3) The broker as agent; (4) Of the adjuster; (5) Personal liability of the agent to the company; (6) Personal liability of the agent to the insured; (7) Unlawful discharge of the agent; (8) Ownership of agency, and (9) Statutory penalties. The little book is written in a simple and intelligible style, and will doubtless be found useful, not only to the profession, but to the insurance companies and the agents themselves.

G. W. P.

HALF A CENTURY WITH JUDGES AND LAWYERS. By JOSEPH A. WILLARD, Clerk of the Superior Court of Massachusetts. Boston & New York: Houghton, Mifflin & Co. 1895.

Mr. WILLARD has undertaken to give to the public a more or less connected account of the striking incidents of which he has been a witness during his long term of service in the Massachusetts Courts. He begins his book with a short account of himself and his family. He writes in a pleasant vein, with now and then a touch of acerbity. His own experience as a sailor when a young man leads him to speak thus of RICHARD H. DANA: "Dana went 'Two Years before the Mast,' which was sufficient for him. From my experience I think his work somewhat exaggerated; and from my acquaintance with him and his surroundings in boyhood, I am not surprised, for there could not have been any greater contrast than existed between his life, up to the time he shipped, and the two years he had spent in the fore-castle. I admit his great ability as an orator, but I think that his manners were rather frigid, and he could not let himself down

to the level even of some of those of his own rank of life." Perhaps this is the balancing of an account opened on some occasion in the past when Mr. DANA so far forgot himself as to treat the Clerk with less deference than that which he showed to the court.

As to the rest of the book, suffice it to say that there is in it (as is usually the case in collections of anecdotes) a mixture of the good and the bad, the new and the trite. Of course the author has several times fallen into the error—from which no writer of such a book can be secure—of crediting to a particular judge or lawyer of his acquaintance a witticism which in fact was the repetition of a witticism of the more distant past. But what he tells he tells well, and his pages will doubtless afford entertainment to those who have themselves seen and known the men of whom he writes—and who have, perhaps, themselves been actors in some of the scenes which he describes.

G. W. P.

AMERICAN ELECTRICAL CASES. Edited by WILLIAM W. MORRILL. Vol. II. Albany, N. Y.: Matthew Bender. 1895.

The second volume of American Electrical Cases contains over one hundred and fifty complete reports of cases decided between the years 1886–1889. In a "general note" there are memoranda of about twenty-five additional cases, which, for various reasons, were not selected for reprinting in full.

Several very excellent changes have been made in the arrangement of this volume. The cases are grouped together, as far as possible, with reference to their subject-matter, and are not arranged in chronological order as in volume one; and at the end of each syllabus is a list of the cases cited in the following opinion, which are reported in this series, with a reference to the volume and page where each may be found.

The very excellent form of index of volume one, which was in the nature of a short collection of annotations under appropriate headings, has been retained.

EDWARD BROOKS, JR.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

JUNE, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR MAY.

Edited by ARDEMUS STEWART.

A hotel-keeper, in whose safe a regular boarder deposits money for safe keeping, is no more than a bailee for him, and when the money is stolen from the safe by his night clerk, is not liable therefor, in the absence of any proof of want of ordinary care in employing him: *Taylor v. Downey*, (Supreme Court of Michigan,) 62 N. W. Rep. 716.

When the proprietor of a hotel employs a servant to receive and keep the property of guests while at meals, his liability for the default of this servant in the custody of property so received is not affected by the fact that he has also provided a check-room for the safe-keeping of such property: *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

As the Australian Ballot Law only provides for the form of ballots used at elections of officers, the form of ballot prescribed by another statute for use at a special election to determine the amount of a liquor license is not affected by the former act: *State v. City of Janesville*, (Supreme Court of Wisconsin,) 62 N. W. Rep. 933.

The Australian Ballot Law of Pennsylvania, (June 10, 1893,

P. L. 419, § 14,) does not repeal the acts providing a method and a ballot for an election on the question of increasing the debt of a township; the former section applies only to state questions: *Evans v. Willistown Township*, 3 D. R. 395. But the Ballot Law of Illinois, (June 22, 1891, § 16,) which prescribes the form of ballot for an election on the adoption of "a constitutional amendment or other public measure," has been held to repeal all other laws prescribing ballots and modes of voting in questions relating to municipal affairs: *County of Union v. Ussery*, 147 Ill. 204; S. C., 35 N. E. Rep. 618.

According to a recent decision of the Supreme Court of Nebraska, in *Woods v. McVerncy*, 63 N. W. Rep. 23, (1) The officer charged with the preparation of the official ballot is given discretion in regard to the arrangement of the names, &c., so far as is not inconsistent with the spirit and purpose of the law, which discretion will not be interfered with by the court; and therefore (2) When the officer, in preparing the ballot, arranged the names of certain candidates, nominated by two parties, on single lines, thus :

FOR LIEUTENANT-GOVERNOR.

JAMES N. GAFFIN, of Colon. Democrat and People's Independent.
he could not be mandamus'd to arrange them thus:

FOR LIEUTENANT-GOVERNOR.

JAMES N. GAFFIN. { People's Independent.
 { Democrat.

The Supreme Court of Illinois has lately ruled, that under the Australian Ballot Law of that state, (June 22, 1891, P. L. 108,) which provides that voting shall be by ballots printed and distributed at public expense, that no other ballots shall be used, and that the voter shall prepare his ballot by making a cross opposite the name of the candidate of his choice, or by writing in the name of the candidate of his choice in a blank space on said ticket, and making a cross opposite thereto, voters are not confined to the names printed on the official ballot, but may write thereon the name of any person for whom they wish to vote, and vote for that person: *Sanner v. Patton*, 40 N. E. Rep. 290.

The same court has also held, that when several independent candidates, nominated by petition, were placed in one column on the official ballot, headed "Citizen's Ticket," a voter, who marked the circle opposite that heading, voted for all the candidates in that column: *Murphy v. Battle*, 40 N. E. Rep. 470.

In a recent case in the Supreme Court of Montana, *Stackpole v. Hallahan*, 40 Pac. Rep. 80, the person nominated by

Substituted
Nomination,
Certificate

a political convention as a candidate for the office of county treasurer sent his declination to the central committee, and no certificate of his nomination was ever filed with the county clerk. The committee, being empowered to fill vacancies on the ticket, nominated another candidate. The certificate of this second nomination failed to show the name of the person for whom such candidate was substituted, the cause of the vacancy, that he was nominated to fill a vacancy, or that the central committee had power to fill such vacancy. But as no objection on these grounds was made until after the election, the fairness of which was not questioned, the court held: (1) That the provisions of the Australian Ballot Law of that state, prescribing the facts to be stated in the certificate of nomination, and the manner in which a nomination may be declined, and the resulting vacancy filled, should not, under such circumstances, be held mandatory; and therefore, (2) The election was not invalid, though the statute requires that a candidate declining a nomination shall so notify the officer with whom his certificate of nomination is filed, in writing, and that the certificate of the nomination made to fill the vacancy shall state the cause of the vacancy, the name of the person for whom the new nominee is to be substituted, and the fact that the committee was authorized to fill vacancies.

The Supreme Court of Appeals of Virginia has just decided, that the statute of that state adopting the Australian Ballot System, (Act of March 6, 1894,) is constitutional, though it contains a provision that the time within which the elector must prepare his ballot shall be limited to two minutes and a half: *Pharson v.*

Voting,
Limitation of
Time

Board of Supervisors of Brunswick Co., 21 S. E. Rep. 483.

In the same case it was also held that in a provision that a sworn special constable, therein provided for "may" render assistance in preparing the ballot to an elector physically or educationally unable to vote, the word "may" is mandatory.

Assistance
to Voter

The Supreme Court of the United States, in *Lem Moon Sing v. United States*, not yet reported, has decided, that the decision of the immigration officers in regard to the exclusion of an alien is conclusive, unless appealed from to the Secretary of the Treasury, as provided by law, and cannot be reviewed by the courts on *habeas corpus*.

Chinese
Exclusion
Law,
Decision of
Custom
Officers

The Supreme Court of Illinois has recently held, in accord with the weight of authority, (1) That the courts have jurisdiction to decide as to the constitutionality of a legislative apportionment, though the question involves only political rights; and (2) That under a constitutional provision (Const. Ill. Art. 4, § 6,) which provides that "senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and containing, as nearly as practicable, an equal number of inhabitants, but no district shall contain less than four-fifths of a senatorial ratio," an apportionment act is valid, which bounds the districts by county lines, and creates no district containing less than four-fifths of the ratio, though it applies the rule of compactness to only a limited extent: *Pro. v. Thompson*, 40 N. E. Rep. 307.

Constitutional Law,
Apportionment

In general, any gross violation of the constitutional requirements will render an apportionment act invalid: *e. g.*, a greater number of representatives than allowed by the constitution cannot be allotted: *State v. Francis*, 26 Kans. 724; if the constitution forbids the division of a county or district, an apportionment act which violates that prohibition is void: *State v. Cunningham*, 81 Wis. 440; S. C., 51 N. W. Rep. 724; and if there are any glaring inequalities of population or repre-

sensation, these will be taken as a sure indication that the legislature has transgressed the bounds of its discretion: *Pro. v. Canaday*, 73 N. C. 198; *Board of Supervisors of County of Houghton v. Blacker*, 92 Mich. 638; S. C., 52 N. W. Rep. 951; *Giddings v. Blacker*, 93 Mich. 1; S. C., 52 N. W. Rep. 944; *State v. Cunningham*, 83 Wis. 90; S. C., 53 N. W. Rep. 35; *Parker v. State*, 133 Ind. 178; S. C., 32 N. E. Rep. 836; 33 N. E. Rep. 119; *Ballentine v. Willey*, 2 Idaho, 1208; S. C., 31 Pac. Rep. 994. See *State v. Wrightson*, 56 N. J. L. 126.

The only case to the contrary is *Pro. v. Rice*, 135 N. Y. 473; S. C., 31 N. E. Rep. 921, which is discussed in 31 AM. L. REG. 851 *et seq.* When, however, the discretion of the apportioning power is properly exercised, as in the Illinois case, the apportionment is valid, though not mathematically exact: *State v. Campbell*, 48 Ohio St. 435; S. C., 27 N. E. Rep. 884.

The same rules apply to an apportionment made by a subordinate body in which that power is vested: *Pro. v. Board of Supervisors of Kings County*, 138 N. Y. 95; S. C., 33 N. E. Rep. 827; reversing 30 N. Y. Suppl. 470; *In re Baird*, 142 N. Y. 523; S. C., 37 N. E. Rep. 619; affirming 75 Hun, 545; S. C., 27 N. Y. Suppl. 535; *In re Whitney*, 142 N. Y. 531; S. C., 37 N. E. Rep. 621; affirming 75 Hun, 581; S. C., 27 N. Y. Suppl. 657.

According to a recent decision of the Supreme Court of Illinois, an Act which declares that "no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, is unconstitutional, on the ground that it deprives persons of property and liberty without due process of law: *Ritchie v. Pro.*, 40 N. E. Rep. 454.

A statute authorizing grand jurors, when assembled to investigate offences, to require a justice to commit to jail witnesses who refuse to answer proper questions, is not unconstitutional, on the ground that it authorizes the exercise of a judicial power by the executive department; nor on the ground that the recalcitrant witness is deprived of his liberty without due process of law; and the justice may commit such a witness, when required, without a

regular trial and judgment: *In re Clark*, (Supreme Court of Errors of Connecticut.) 31 Atl. Rep. 522.

The Supreme Judicial Court of Massachusetts has lately ruled, that when an accomodation note, given by the plaintiff to a corporation, was discounted, and not paid at maturity; and the defendant, who was a stockholder, director and creditor of the corporation, in consideration of the plaintiff's advancing him money to pay the note, gave the plaintiff his note for the amount advanced; that the defendant's note was supported by a valid consideration: *Abbott v. Deane*, 40 N. E. Rep. 197.

Contract,
Promissory
Note,
Consideration

According to the Supreme Court of Texas, a combination of dealers in beer, which secured control, by lease, of "all the cooling-room capacity for cooling beer" in a town, so that competition in the sale of beer would be kept out, is a combination in restraint of trade, and unlawful, under the statutes of that state, and the parties to it cannot recover for a breach of a contract, the performance of which would have enabled them to carry out their unlawful enterprise: *Anheuser-Busch Brewing Assn. v. Heuck*, 30 S. W. Rep. 869, affirming 27 S. W. Rep. 692.

Restraint
of Trade

The Supreme Court of Montana has recently held, that when the by-laws of a corporation authorize the trustees or directors thereof to employ a superintendent, and fix his salary, a trustee, who is also secretary of the corporation, may recover on an implied contract for services rendered as superintendent, if such services are clearly outside his ordinary duties as secretary or trustee, and are performed under circumstances showing that it was well understood by the officers of the corporation, as well as by himself, that they were to be paid for: *Felton v. West Iron Mountain Mining Co.*, 40 Pac. Rep. 70.

Corporations,
Directors,
Compensation

According to a late opinion of the Supreme Court of Delaware, a corporation is not a citizen, within the provisions of the Constitution of the United States, securing to a citizen of any state the rights, privileges and immunities guaranteed to the citizens of the several states;

Foreign
Corporations,
Citizenship

and that therefore the usage of interstate comity does not warrant the issuance of a writ of mandamus to compel a domestic corporation to aid a foreign corporation, whose operations are expressly limited by its charter to the state where it was incorporated, to conduct its business in another state: *State v. Del. & Atl. Telegraph & Telephone Co.*, 31 Atl. Rep. 714.

In a case recently decided by the Circuit Court of Appeals for the Fifth Circuit, *Zachry v. Nolan*, 66 Fed. Rep. 467, the plaintiff gave to the defendants an option for thirty days, in writing, to lease certain stock in a corporation owned by her, and at the same time gave them a proxy to vote on the stock. At a stockholders' meeting, held within the thirty days, the defendants offered to vote on the stock, and their right to do so being challenged, exhibited the proxy and the option as proof of their right, which proof was accepted, and their votes received. The plaintiff afterwards sued the defendants for the rent of the stock, specified in the option, as upon accounts stated, claiming that their acts in voting on the stock constituted an acceptance of the option. The trial court charged that these acts were an acceptance of the option; but the Court of Appeals held that this was error, and that the question was one for the jury to decide.

Stock,
Option to
Lease,
Proxy Voting

A verdict of guilty in a criminal case, set aside on the ground that it was contrary to the evidence, does not constitute a bar to a subsequent trial under the same indictment: *State v. Bourman*, (Supreme Court of Iowa,) 62 N. W. Rep. 759.

Criminal Law,
Former Conviction,
Bar

When a judgment, entered upon a verdict of guilty as charged in the indictment, on a trial of an indictment for murder, has been reversed on writ of error, because the verdict did not ascertain the degree of the crime, and a new trial has been awarded, the accused can be tried again upon the same indictment, and the second trial will not put him in jeopardy a second time for the same offence, within the meaning of the constitution: *Levitt v. State*, 33 Fla. 389; S. C., 14

So. Rep. 837. So, when, on appeal, a new trial is granted in a criminal case, on the ground that the judge below erred in submitting the case to the jury when there was not sufficient evidence to warrant it, the defendant cannot, on the new trial, plead former acquittal, for he was convicted in the court below, and the granting of a new trial is not an acquittal, nor can he plead former conviction, for it was set aside, and a new trial granted: *State v. Rhodes*, 112 N. C. 857; S. C., 17 S. E. Rep. 164. But the fact that an appeal is pending will not deprive the defendant of the bar, when the judgment is otherwise sufficient: *United States v. Olsen*, 57 Fed. Rep. 579.

The same rules apply when a verdict of guilty is set aside by the trial court, in its discretion, and a new trial granted; in such a case the plea of former jeopardy cannot be sustained: *State v. Lee*, (N. C.) 19 S. E. Rep. 375; *State v. Benjamin*, (La.) 14 So. Rep. 71.

Again, a conviction of murder, set aside at the instance of the defendant because of a defect in the information, is no bar to a subsequent trial and conviction for the same offence, in a new and valid information: *Pro. v. Schmidt*, 64 Cal. 260; S. C., 30 Pac. Rep. 814. A plea of former jeopardy to a persecution for arson, is not sustained by proof that there had been a mistrial, and that afterwards a new indictment was returned, either because the former indictment had been lost, or because the name of the owner of the property destroyed had been erroneously stated: *Thompson v. Commonwealth*, (Ky.) 25 S. W. Rep. 1059.

Similarly if, for any reason, the verdict is void, it cannot be set up as a bar to a subsequent prosecution for the same offence. Thus, the trial and conviction of a defendant in a federal court, which had no jurisdiction of the offence, will not bar a prosecution in the state court for the same offence: *Blynn v. Commonwealth*, 91 Ky. 200. And when one of the trial justices is related to the defendant within the prohibited degrees, and the conviction is set aside on that ground, and a new trial ordered, the former conviction is no bar to the second trial: *Pro. v. Connor*, 142 N. Y. 130; S. C., 36 N. E. Rep.

807 ; affirming 20 N. Y. Suppl. 209 ; S. C., 65 Hun. 392 ; 8 N. Y. Crim. Rep. 439.

But when the jury separates, after rendering a void verdict, the defendant, having been once in jeopardy, is entitled to be discharged, and cannot be tried again: *Jackson v. State*, (Ala.) 15 So. Rep. 351 ; and when the defendant is convicted of a lower offence than that charged in the indictment, which involves an acquittal of the higher offence, the fact that the conviction of the lower offence was set aside, and a new trial granted, at the instance of the defendant, will not entitle the state to place him on trial again for the higher offence: *Pro. v. Gordon*, 99 Cal. 227 ; S. C., 33 Pac. Rep. 901.

One who, by false pretences, obtains goods ordered from a salesman, may be tried in the county from which the principal shipped them: *Commonwealth v. Karpowiski*, (Supreme Court of Pennsylvania,) 31 Atl. Rep. 572.

The Supreme Court of New Hampshire, in a very able and learned opinion, has recently decided, that when a testator, in devising his estate in trust, provided that when the youngest of his grandchildren, born and unborn, should arrive at the age of forty years, the residue of the estate should be theirs,—that the invalidity of the devise to the grandchildren, as in violation of the rule against perpetuities, would not defeat it, but, under the doctrine of cy pres, the state would be allowed to vest in them, when the youngest reached the age of twenty-one: *Edgirdy v. Barker*, 31 Atl. Rep. 900.

In the opinion of the Supreme Court of Nebraska, threats of prosecution and immediate imprisonment of the husband are sufficient to constitute duress, when used to induce a man and his wife to execute and deliver a mortgage upon their homestead, to secure the payment of a judgment against him, if they so overcome the wills of the mortgagors as to induce them to sign the mortgage, and thus execute a security which they would not have executed voluntarily ; and the instrument so obtained is void :

Hargreaves v. Kowek, 62 N. W. Rep. 1086. See 1 AM. L. REG. & REV. (N. S.) 885.

A person who rides on the footboard of an electric street car is not required to anticipate danger from the close proximity of trolley poles to the track; and therefore his failure to listen for warnings, to watch out for such poles, given by the conductor, does not render him guilty of contributory negligence: *Elliott v. Newport St. Ry. Co.*, (Supreme Court of Rhode Island,) 31 Atl. Rep. 694.

According to a recent decision of the Supreme Court of Oregon, equity has no jurisdiction, on the ground of avoiding a multiplicity of suits, of a suit to recover the several amounts due on a contract whereby the defendants, in consideration of the assignment of the several interests of the plaintiffs in an option on a mine, were to refund to each plaintiff the amount already advanced by him to develop the mine: *Van Anken v. Dammeier*, 40 Pac. Rep. 89.

The Circuit Court for the Western District of Pennsylvania has lately held, in *Holton v. Wallace*, 66 Fed. Rep. 409, that a bill in equity, which sets up; (1) An alleged liability to a corporation of one person as an assignee of unpaid stock, and an alleged joint liability with him of five others, by reason of collusion with him to defraud creditors of the corporation; and (2) An alleged liability of five of the same defendants for fraudulent conduct in connection with a sale of the railroad belonging to the corporation;—is multifarious, as the two causes of action are distinct, presenting independent cases for relief, and require different proofs and different decrees.

According to the Supreme Court of Michigan, when the plaintiff in an action for injuries resulting in death has introduced the mortality tables in evidence, and offers no other evidence to show that the probability of life of his decedent was greater or less than that

shown by the tables, it is error to charge that the tables were not controlling, but should be given just such weight as the jury think proper: *Nelson v. Lake Shore & M. S. Ry. Co.*, 62 N. W. Rep. 993.

This, however, can only be true, if even when the verdict, as in this case, is so large as to show conclusively that the tables were disregarded altogether. When there is any other evidence in the case, bearing on the question, the tables are to be taken in connection with that: *City of Joliet v. Brewster*, (Supreme Court of Illinois,) 40 N. E. Rep. 619. See 2 AM. L. REG. & REV. (N. S.) 217; 36 Cent. L. J. 75.

A dentist is not a surgeon, within the meaning of the Michigan statute, (How. St. § 7516,) and therefore communications made to him by a patient are not privileged: *Pro. v. De France*, (Supreme Court of Michigan,) 62 N. W. Rep. 709.

The Supreme Court of Washington has lately ruled, in *Wooding v. Puget Sound Natl. Bank*, 40 Pac. Rep. 223.

(1) That when a sheriff finds on the person of a prisoner a package of money, obtained by fraud from a bank, and the prisoner's mother voluntarily surrenders other packages similarly obtained, and each package is stamped with the name of the bank from which it was received, the sheriff may, with the consent of the parties from whom he took it, take possession of the money, and restore the same to the bank claiming it; and (2) That when money is taken from a person without his consent, by a person who acts as a trespasser in so doing, and is delivered by him to a third person who claims title thereto, it is not subject to garnishment in the hands of the sheriff, or of the parties to whom he delivered it, as the property of the person from whom it was taken.

In a recent case, *Stewart v. Thomson*, not yet reported, the Court of Appeals of Kentucky has reasserted the familiar doctrine that a court of equity will enjoin proceedings on an attachment, fraudulently levied in another state, on property temporarily there, in

Privileged
Communications,
Dentist

Garnishment,
Stolen
Property

Injunction,
Property
Fraudulently
Attached

order to evade the exemption laws of the state of the defendant's residence.

The Supreme Court of Nebraska has recently held, that in order to sustain the finding of a jury that a building destroyed by fire was a "total loss," it is not necessary that the evidence should show that the material of which the building was composed was reduced by the fire to smoke, cinders and ashes. It is sufficient if the building is rendered practically valueless as a building: *Ins. Co. of North America v. Barker*, 62 N. W. Rep. 911.

A total loss does not mean an absolute destruction; and in reference to a building, the question is not whether all the parts and materials composing it are absolutely destroyed, but whether, after the fire, the thing insured exists as a building: *Williams v. Hartford Ins. Co.*, 54 Cal. 442.

When all the combustible material in a building is destroyed by fire, although portions of the brick walls are left standing, but so injured by the fire that they must be torn down, for the purpose of insurance the property is totally destroyed, but if the person insured should use the brick or other material not destroyed to rebuild, the company would be entitled to the value of the brick or other material: *German Ins. Co. of Frankfurt v. Eddy*, 36 Neb. 461; S. C., 54 N. W. Rep. 856.

In a recent case in the Supreme Court of Pennsylvania, *Bradford v. Boley*, 167 Pa. 506; S. C., 31 Atl. Rep. 751,

several interesting phases of the Civil Damage Law were discussed, and their legal effect determined. It was decided, (1) That the interest of a wife in her husband's earning power is not "property," within the meaning of the Civil Damage Act of Pennsylvania, (May 8, 1854, P. L. 663, § 3,) which declares that one who unlawfully furnishes intoxicating drinks to another shall be liable for injury to person or property occasioned by the furnishing; and she cannot therefore recover damages because of the imprisonment of her husband for an act committed while intoxicated:

(2) That the unlawful negligence of a liquor dealer in sell-

ing to an intoxicated person is not the proximate cause of the imprisonment of the latter for an act committed while he was intoxicated. The law intervenes, and becomes the proximate cause:

Proximate
Cause

(3) That when a husband, on receiving his wages, was accustomed to deposit them with his wife, for family use and for safe-keeping, and then, when about to go on a spree, or during one, would apply to her for money to carry it on, she cannot be charged with contributory negligence in letting him have money from the deposit, so as to prevent her recovering damages from a liquor dealer for injuries caused by his unlawful furnishing of liquor to her husband, even though she knew his purpose when she let him have the money.

Contributory
Negligence

The Supreme Court of New York, First Department, has recently decided, that under the statute of that state, (Laws, 1892, c. 602,) providing for the examination and licensing of master plumbers, the decision of the examining board in refusing to grant a license cannot be sustained, when it does not appear that rules of examination had been adopted, prescribing the subjects, and stating the percentage of questions which must be answered correctly to entitle the applicant to a certificate; and that a return to a certiorari to review the decision of the board is insufficient, which simply sets forth the questions asked the relator, and the answers made by him, without alleging that any of the answers were incorrect, and showing wherein they were incorrect: *Pro. v. Scott*, 33 N. Y. Suppl. 229.

License Laws,
Examination,
Review

In a dissenting opinion in the case of *Blomquist v. Chicago, M. & St. P. Ry. Co.*, 62 N. W. Rep. 818, Judge CARRY, of the Supreme Court of Minnesota, has laid down, according to the syllabus prepared by the court, "some novel and interesting principles by which to determine when the superior servant is a vice principal as to the inferior servant." These principles are an attempt to take a position on the vice principal question intermediate between the two extreme views on that subject which at

Master and
Servant,
Vice Principal

prevent prevail; and will probably, with some slight modifications form the rule as finally adopted. Judge CANTY's position, stated in his own words, is this: "It is held by a number of courts that the mere fact that the superior servant has power to hire, discharge and direct the inferior servant is alone sufficient to constitute the superior servant a vice principal as to the inferior servant; but it seems to me that it should require something more to give the superior servant that character. It is often the case that the inferior servant is more familiar than such foreman with the dangers to which he is exposed, and is better able to protect himself from those dangers than the foreman is to protect him; and yet without his fault, and by reason of exposure to those dangers, he may be injured through the negligence of the foreman. When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able to care for himself as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice principal, but he and the inferior servant are fellow servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and from his grade or position cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant. It is very often the case that the prosecution of the work requires a very high degree of skill and experience in the foreman, and but little skill or experience in the inferior servant, who is neither hired nor paid to exercise the skill necessary for his own protection. If the position of the foreman is one which requires of him superior knowledge or skill, which cannot be required or expected of the inferior servant, but which is necessary for the protection of such inferior servant, then, in regard to the exercise of such superior knowledge or skill, the foreman is a vice principal. There must be something more in the inequality of the foreman and inferior servant than that which results alone from the one

having the authority to hire, discharge, and oversee the other. It is the actual disparity or inequality between them which should control, and the disparity which gives the foreman the character of vice principal must be substantial, not merely slight. As far as I am able to discover, after much investigation, there are but two kinds of this disparity: (1) Disparity of knowledge; and (2) disparity of skill. Disparity of knowledge is where the foreman has or should have knowledge which the inferior servant neither has nor can be expected to have, the want of which knowledge on the part of such servant causes or contributes to his injury. Disparity of skill is where the foreman has or should have skill which the inferior servant neither has nor can be expected to have, the want of which skill on the part of such servant causes or contributes to his injury. The existence of such disparity of either or both kinds is a question of fact for the jury, and the burden is on the party asserting such disparity to prove it."

This is true, if it be modified by saying, that these facts, disparity of knowledge and disparity of skill, are to be taken in connection with the fact of the authority possessed by the foreman; and not as controlling the decision of the question, independent of the latter. It must also be understood that disparity of knowledge refers not to theoretical knowledge, but to practical knowledge of the conditions under which the inferior servant is then working. With these modifications, these rules are far preferable to any yet laid down for determining this vexed question.

The Supreme Court of Rhode Island has recently held, that a member of the fire department is not an employee of the taxpayer of the municipality by which he is employed, in such a sense as to create an implied invitation from them to enter their premises to extinguish fires, so as to render them liable for personal injuries suffered by him in consequence of the dangerous condition of the premises, in a case where liability there would not otherwise exist: *Behler v. Daniels*, 31 Atl. R. 582.

Negligence,
Licensee,
Foreman

The Court of Appeals of New York, in *Pro. v. Rathbun*, 40 N. E. Rep. 395, has affirmed the decision of the Supreme Court, reported in 32 N. Y. Suppl. 108, that a notary public is a public officer, within a constitutional provision that any public officer, elected or appointed to a public office, who shall travel on a free pass, shall forfeit his office.

According to a recent decision of the Court of Appeals of Maryland, a provision in partnership articles that the salaries of the members shall not be considered as losses sustained by the business, entitles a partner to his salary unconditionally; and therefore, when a partner left the monthly instalments of his salary in the hands of the firm, to be used for its benefit, he is entitled, in settling the partnership accounts, to interest on the several instalments from the time each became payable to him: *Kriley v. Turner*, 31 Atl. Rep. 700.

The Supreme Court of the United States has lately ruled, that when the rights under a patent have been assigned to different persons for different states, a dealer in one state may purchase the patented articles of the assignee for another state, for the purpose of resale in his (the dealer's) state, and may sell them there without liability to the assignee for that state: *Kerler v. Standard Folding-bed Co.*, 15 Sup. Ct. Rep. 738. Chief Justice FULLER, and Justices BROWN and FIELD, dissented.

According to the Supreme Court of Montana, under an act which provides that the board in which rests the power of allotting public contracts shall contract with the lowest responsible bidders therefor, the board has discretionary powers, and mandamus does not lie to compel it to award a contract to a bidder who, although the lowest, is, in its judgment, not responsible: *State v. Richards*, 40 Pac. Rep. 210.

A provision that a public contract shall be awarded to the

"lowest responsible bidder," is mandatory; but in ascertaining whether or not a bidder is responsible, the awarding body is required to deliberate and decide; in so doing its members exercise judicial functions; and therefore, however erroneous their decision may be, they cannot be compelled by mandamus to alter their determination: *Hoole v. Kinkrad*, 16 Nev. 217; *Commonwealth v. Mitchell*, 82 Pa. 343; *Douglass v. Commonwealth*, 108 Pa. 559; *Kelly v. Chicago*, 62 Ill. 279; *Pco. v. Dorshimer*, 55 How. Pr. (N. Y.) 118. The same is true, when the board, though it has a rule to accept the lowest and best bid, reserves the right to reject any or all bids: *Anderson v. Board*, (Mo.) 27 S.W. Rep. 610. There is a full discussion of this subject in 1 AM. L. REG. & REV. (N. S.) 899.

But when, by statute or charter, a public contract is to be awarded to the lowest bidder, "who shall give satisfactory proof of his or their ability to furnish the requisite materials and perform the work properly," the determination of the question as to who is the lowest bidder does not rest upon the exercise of an arbitrary, unlimited discretion by the board or official who is to award the contract, but upon the exercise of a *bona fide* judgment, based upon facts tending reasonably to the support of that determination. There must be a rational basis of fact to support this determination; but if this exists, the court will not weigh disputed evidence and facts in order to review the action of the awarding power: *State v. Board of Public Works of City of Trenton*, (Supreme Court of New Jersey.) 31 Atl. Rep. 613.

The Supreme Court of Nebraska, in *Pounder v. Ash*, 63 N.W. Rep. 48, has just decided a very interesting case on the subject of the conclusiveness of the decrees of an ecclesiastical tribunal acting within the bounds of its authority, and the power of the courts of law to enforce such decrees by appropriate proceedings. It held, overruling its former decision, in 36 Neb. 564; S. C., 54 N.W. Rep. 847, that when charges have been preferred against a minister of the gospel, and he has been adjudged guilty by the highest

Religious
Societies,
Rules of
Government,
The Judiciary,
Enforcement
by
Courts of Law

tribunal of the church organization before which the matter has been presented, has been deposed from the ministry, and expelled from membership in the church, the courts of law will recognize such a judgment of the church tribunal, and enforce its observance, when regularly brought to their notice; and in an action for the purpose, will enjoin the one against whom it was rendered from further acting in the capacity of a minister, or enjoying the rights of a member of the particular church organization; and, when it further appears that the church property was conveyed to the organization or its trustees for church purposes, and in such a manner that it is subject to the control of the general association or governing power of the church, and its rules and laws, will also enjoin such person and member of the local congregation, or any others who have combined with him, from excluding from the church building and property, and from its use for any proper purpose, or from disturbing, in or during such use, any parties or ministers appointed to take charge of the congregation and church, by the then recognized and appointive power, disclosed to be such by the evidence in the case, or in so excluding and disturbing a presiding elder of the church from or in its proper occupancy or use, or any members in good standing who desire to worship therein in a regular manner, and according to the established rules and ordinances of the church.

A vote on proposed amendments to a church constitution cannot be adjudged invalid, on a collateral attack in ejectment

Elections.
Ballots between adverse factions of a church to recover church property, on the ground that the ballots indicated unfairness, in that all contained the word "Yes," with directions that those voting in the negative must erase that word, and insert the word "No:" *Russic v. Brassell*, (Supreme Court of Missouri,) 30 S. W. Rep. 526.

The constitution of a religious society, adopted by the general conference and acquiesced in for forty years, though
Constitution,
Amendments never submitted to or ratified by the members of the society, and never fully recognized by the body of the church, nevertheless is the paramount law of the

society, and can be changed or repealed only as provided by the constitution itself, not by the conference or legislative body by which it was adopted: *Russie v. Brussell*, (Supreme Court of Missouri,) 30 S. W. Rep. 526.

The Supreme Court of Illinois has reached substantially the same result, in *Kuns v. Robertson*, 40 N. E. Rep. 343.

The Supreme Court of North Carolina, in *State v. Wernwag*, 21 S. E. Rep. 683, has lately rendered a decision that seems hardly just. A city ordinance prohibited the sale
 Sale of fresh meats within certain limits, without license.

The manager of a hotel within the limit sent a telephone message to a butcher who lived outside the limit, ordering him to bring some fresh meats to the hotel, at prices agreed on. Accordingly, the butcher brought the meats to the hotel in his own wagon, and delivered them, receiving payment afterwards. This was held a violation of the ordinance, on the ground that the telephone order was executory, and the sale was consummated only upon delivery. The decision is supported by the following acute reasoning: "The plain meaning of the matter is this: The hotel manager sent a message to a seller of meats outside of the three-fourths mile limit. 'Bring me some fresh meats of a certain description. If they are such as I order, I will take them, and pay you for them; if they are not of the kind I order, I will not.' Surely, there is no sale in this."

Why not? It is true, that when the sale is completed only by delivery, it is to be regarded as made at the place of delivery: *Doster v. State*, 18 S. E. Rep. 997; or if delivered to a common carrier, that delivery is regarded as a constructive delivery to the buyer, and the sale is then complete: *State v. Flanagan*, 38 W. Va. 53. But it is difficult to see the reason for the distinction. The carrier is, to some extent at least, the agent of the seller, for the latter has the right of stoppage *in transitu*, which is often far more effective in its results than his absolute right of recall over his own delivery wagon would be. The rule has been adopted to make more efficient the laws restricting the liquor traffic; but however laudable the object, that alone is

no excuse for the exercise of a power that belongs properly to the legislature. Whatever the rights of the parties, the sale is either complete when the offer of one party is accepted by the other, or else not until the payment is made; and no merely utilitarian considerations can authorize the courts to fix it arbitrarily at the intermediate point of delivery.

The Exchequer Division of Ireland has recently held, that when the owner of a house allowed his sisters to reside therein, contributed to their support, paid the rent and taxes, and executed all necessary repairs, their occupation was in the character of guests and not of tenants at will, and therefore the statute of limitations did not run against the owner: *Prakin v. Prakin*, [1895] 2 Ir. R. 359.

Statute of
Limitations,
Adverse
Possession

The Supreme Court of Nevada has ruled, (1) That when the title of an act states that its subject is to amend one section of a former statute, the act cannot be extended to the amendment of other sections; but (2) If the sections of such an act, which attempt to amend other sections of a prior act than that mentioned in the title, are so separate and independent that one section can be made to operate in accordance with the intention of the legislature without the aid of the others, and the invalid sections have not constituted any inducement for the first, that section should be sustained, though the other sections are unconstitutional: *Ex parte Hewlett*, 40 Pac. Rep. 96.

According to the Supreme Court of Ohio, since an amended section of a statute takes the place of the original section, and must be construed with reference to the other sections, and they with reference to it, and since the whole statute, after the amendment, has the same effect as if re-enacted with the amendment, an unconstitutional statute may be amended into a constitutional one, so far as its future operation is concerned, by removing its objectionable provisions, or supplying others, so as to make it conform to the requirements of the constitution: *State v. City of Cincinnati*, 40 N. E. Rep. 508.

Statutes,
Amendments,
Constitutionality

In a recent case in the Supreme Court of Michigan, *Drafer v. Ashby*, 62 N. W. Rep. 707, a first mortgage of land had been foreclosed, without making the second mortgagee a party to the suit. The first bought in the land; but, before the equity of redemption expired, quitclaimed the land to the mortgagor in consideration of the amount due upon the mortgage. At the same time the mortgagor executed to the defendant, who had loaned him the money wherewith to redeem the land, a mortgage to secure the loan. Defendant's attorney, on examination of an abstract of title, had reported the title in the first mortgagee, on the supposition that the second mortgagee had been made a party to the foreclosure suit, and the loan was made by defendant in the belief that the second mortgage was cut off. Under these circumstances, the court held that the defendant should be subrogated to the rights of the first mortgagee, and entitled to priority over the second mortgage.

Subrogation.
To Rights of
Mortgagee

The Court of Appeals of Kentucky has recently glorified itself by declaring that the running of an excursion train on Sunday is a work of necessity: *Louisville & N. R. Co. v. Commonwealth*, 30 S. W. Rep. 878. But it very prudently abstains from giving any reason why, other than that the company might deem it necessary. It would have been wiser still to have refrained from giving this.

Sunday.
Work of
Necessity.
Excursion
Trains

The running of trains by a railroad company on Sunday is within the prohibition of a statute which punishes any person who labors in his calling on the Sabbath day, or employs his servants in so doing, except in works of necessity or charity: *State v. Railroad Co.*, 24 W. Va. 783. This applies to railroads engaged in interstate commerce, as well as to those which carry on purely domestic traffic: *State v. Railroad Co.* 24 W. Va. 783; *Hemmington v. State*, 90 Ga. 396; S. C., 1; S. E. Rep. 1009, *contra*; *Norfolk & W. R. R. Co. v. Commonwealth*, (Va.) 13 S. E. Rep. 340.

According to the Supreme Court of New York, a name

such as "granite," used to designate a patented article, takes upon it the same nature as the patent, becomes public property on the expiration of the patent, and can be used by the public in connection with that article; and the manufacturer is not entitled to the exclusive use of it thereafter, as a common law trade-mark, though such might have been the case, if used in connection with a non-patented article: *St. Louis Stamping Co. v. Piper*, 33 N. Y. Suppl. 443.

Among the various absurd rules of the common law, to which the courts still cling with a pertinacity like that of the drowning man in the proverb, is that which permits the presumption of having issue to continue till the possibility of it, within the knowledge of the medical profession, is long past. If, as Lord COKE asserts, "the law seeth no impossibility of having children," when a man and his wife are each of them one hundred years old, then is the law not that perfection of human reason that some would fain have us believe, but rather a certain agglomeration of arbitrary rules designed more nicely for the accommodation of judges in the speedy determination of causes, than for the exact furtherance of justice betwixt man and man. Without discussing the propriety of the results obtained by its application in some cases, which might be obtained equally well in other ways, it may be said that the grossest injustice is caused by its application to cases in which the word issue, when used in reference to a woman physically incapable of childbearing, who had no legitimate child, is yet held not to include illegitimates, in the absence of other words in the will. The latest instance of this is to be found in *Flora v. Anderson*, 66 Fed. Rep. 182, decided by the Circuit Court for the Southern District of Ohio, Western District. One Longworth devised part of his estate in trust for his daughter for life, with remainder to the issue of her body surviving her. At the time the will was made the daughter had no legitimate issue, and was nearly fifty years of age. After her death, one Flora, alleged to be an illegitimate child of the said daughter, claimed

Trade Mark,
Designation
of Patented
Article

Will,
Issue,
Illegitimates.

the remainder. But the court held (1) That a devise to "issue" means *prima facie* legitimate issue, and an intention to include illegitimates must appear from the will itself, without resort to extrinsic evidence: (2) That it was conclusively presumed that it was possible that the daughter might have issue at any time during her life: and therefore (3) That it was not competent to prove that she was past the age of child-bearing when her father's will was made, for the purpose of showing that her father must have had an illegitimate child in view, in creating the remainder to her issue.

No intelligent man doubts that such was the case; it is hardly likely that the court itself doubted it; but *ita lex scripta est*; it is so much easier to stand on authority than to be independent, even if justice must thereby remain blind.

An adopted child is not "issue of the marriage," within the meaning of § 1298 of the Civil Code of California, providing that if a testator marry, and have issue of such marriage, his former will is revoked: *In re Comassi's Estate*, 40 Pac. Rep. 15.

The adoption of a child does not revoke an antecedent will of the adopting parent, under the laws of Indiana: *Davis v. Fogle*, 124 Ind. 1; S. C., 23 N. E. Rep. 860.

Revocation,
Adoption of
Child

WHAT IS NOW AN INDIRECT TAX?

By LOUIS D. RICHARDSON.

Now that the smoke is beginning to clear away from the contest over the Income Tax Law, and the last decision of the court has been made, it is fitting for the lawyer to ask himself what is the state of constitutional law on the subject of direct and indirect taxes? One can leave the discussion of the merits of the decision until the question again comes before the courts. In fact, could any profit be made by discussing the correctness of the opinion of the court—little new could be said, almost every argument which could, by any ingenuity, be advanced by either side, having been made by the counsel engaged in the case or in the astute opinions of the majority and minority of the bench itself. What we want to do is to point out here exactly what is a direct tax under the decisions of the Supreme Court, including this last and principal utterance. For it must be remembered that the majority, in delivering their opinion, while they admitted that they did not follow the sentiments of the judges in the *Hilton* case, or in subsequent cases, as to the true criterion of what was a direct tax within the meaning of the constitution, nevertheless expressly contended that, in deciding a tax on incomes derived from personal or real property a direct tax, they did not overrule any of the court's previous decisions. We can therefore assume that those decisions are still law. For instance, that a tax on carriages is as good to-day as it was when the case of *Hilton v. United States* was decided; and therefore, reasoning by analogy, we can say that a tax on any species of personal property, which is used by the owner, is still a duty or license for its use, and therefore, that the United States can tax all steam engines, all cars, and, in fact, any

species of personal property where the tax is paid by the person who uses the same, irrespective of the fact of his being the owner or no.

Again, we can also say, since the case of *Pacific Insurance Co. v. Soule*, which decided that a tax on incomes of insurance companies was a direct tax, is left undisputed by the present decisions; that the income of any business, of any corporation, can still be taxed by Congress, using the rule of uniformity and not that of apportionment. A federal law taxing the income of all railroads, banks, insurance companies, manufacturing companies, etc., at a given rate would still be valid, at least as far as the income of these corporations was not derived from the investment of their capital in land or securities. From the decision in the Springer cases, as expressly interpreted by Mr. Chief Justice FULLER in his recent opinion, we can affirm that not only can the United States tax the incomes of corporations derived from the prosecution of their business, but also the incomes of all business and professional people; and from the decision in *Vicasie Bank v. Fenno*, which is not in any wise qualified by this present decision, a tax on the special acts in business is still valid. That is, the United States can place a tax on all auction sales, on commercial paper, on checks, or on any other act which a man may do in the course of business. In fact, so long as the tax is not measured by the amount of property, real or personal, which a man has, or on the income from property, the tax is still valid. The recent decisions, as we read them, put forth two distinct propositions, the first is that a general property tax is a direct tax; the second, that a tax on incomes from property is a tax on the property, and therefore a tax on income is a direct tax, provided the income is derived from property, but is not a direct tax where the incomes consist of the gains or the profits of business. A tax which falls on the users of property as such, except the occupiers or users of real estate, is an indirect tax. Any tax which falls on the ownership of property as such, or the fruits of ownership, as rent or interest, is a direct tax, and must be apportioned among the several states.

This, then, is the law as we have it to-day from the highest tribunal in the country, though, in view of the way in which the majority of the court have dealt with the prior decisions on the subject, disregarding their spirit and excepting merely the letter of the decision itself, very little can be said to be finally decided in constitutional or other law. For instance, if the question of legal tender ever comes before the court again, the judges of that day can say that all that was actually decided in the legal tender cases was that Congress had the power to issue paper money and to redeem paper money issued in time of war.

THE IRRESPONSIBILITY OF THE JUDICIARY.

By ARDENUS STEWART, Esq.

It is one of the oldest and most firmly settled rules of the common law, that a judicial officer is not liable to an action for damages resulting from the doing of any act within his jurisdiction, whether done *bona fide*, in the discharge of what he honestly believed his duty, or done maliciously and from a corrupt motive. If he had jurisdiction, he is secure. This rule was adopted, as was said by Lord GIFFORD, in *Miller v. Hope*, 2 Shaw, Sc. App. Cas. 125, since, if such an action would lie, the judges would lose their independence, and the absolute freedom and independence of the judges is necessary for the administration of justice. HAWKINS, (P. C. b. 1, c. 7, p. 6,) states this reasoning a little more at length. "The authority of government cannot be maintained," he says, "unless the greatest credit be given to those who are so highly entrusted with the administration of public justice, and that if they should be exposed to the prosecution of those whose partiality to their own causes would induce them to think themselves injured, it would be impossible for them to keep up in the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigor and success."

This rule has been followed with the greatest unanimity. In *Floyd v. Barker*, 12 Co. Rep. 223, the judge and the grand jury were held not liable to be sued in the Star Chamber for a conspiracy in respect of their acts in court, in convicting a person of felony. In *Hamond v. Howell*, 2 Mod 219, a judge who committed for an alleged contempt, under a warrant showing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistake in judgment was no cause of action. The same was the basis of the decision in *Carr v. Mountain*, 1 M. & G. 257, where the justice had committed the plaintiff on an infor-

mation which contained no legal evidence either of any offence, or of the plaintiff's participation in that which was supposed to be an offence. In *Fray v. Blackburn*, 3 B. & S. 576, the judge was held not to be liable for having discharged a rule taken by the plaintiff against the defendant for the payment of costs. In *Scott v. Stansfield*, 3 L. R. Exch. 220, the defendant, a county court judge, was held not to be liable to an action of slander, for having said of the plaintiff, an accountant, then defendant in a cause pending before the judge, "You are a harpy, preying on the vitals of the poor." In *Haggard v. Pitcheir Friirs*, [1892] A. C. 61, it was held that an action for damages would not lie against the appellant, a judge of the consular court of Madagascar, for dismissing without proof an action which he held to be vexatious. And in the most recent English case, *Anderson v. Gorrie*, [1895] 1 Q. B. 668, the judges of the Supreme Court of one of the colonies were held not to be responsible in damages for committing the plaintiff to prison in default of excessive bail, and refusing to allow a *habeas corpus* to determine the validity of the committal.

Against this consensus of opinion there seems to have been, in England, but one dissenting voice, and that but an *obiter dictum*. In *Thomas v. Churton*, 2 B. & S. 475, Chief Justice COCKBURN declared: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable or probable cause, he is not to be liable to an action." This is of course open to the criticism of Lord ESHER, in *Anderson v. Gorrie*, [1895] 1 Q. B. 668, that he was convinced "that had the question come before that learned judge, he must and would, after considering the previous authorities, have decided that the action would not lie;" but it at least shows how strongly he felt the injustice of the rule in its application to particular cases, and the necessity for some qualification of it in order to secure suitors against the malice or the venality of the court.

The one exception to this rule which has been allowed, is, that the judge will be liable, if the matter in regard to which

he is charged with having acted unjustly was one without his jurisdiction. Yet even this has been emasculated by adding the qualification that he must have had the means of knowing that it was not within his jurisdiction: *Culder v. Halket*, 3 Moore, P. C. 28. This was undoubtedly the true ground of the decision in *Gwynne v. Poul*, 2 Lutw. 387, where the defendant was held not to be liable in trespass, although, as a judge of an inferior court, he had caused the plaintiff to be arrested in an action where the cause of action arose out of his jurisdiction; for, although the *capias* was issued without a previous summons, and was not made returnable at a certain time, it was held that he was justified, because he had acted as judge in a matter over which he had reason to believe that he had jurisdiction. The mistake as to jurisdiction, however, must be one of fact, and not of law; and if a judicial officer, with full knowledge of the facts, but under an erroneous impression that he has jurisdiction, acts to the injury of another, an action will lie against him: *Holden v. Smith*, 14 Q. B. 841.

This is the substance of the English decisions on this question; and the same principles have been applied with practical unanimity in the American cases. Of these, the leading case is *Yates v. Lansing*, 5 Johns. (N. Y.) 282; affirmed in 9 Johns. (N. Y.) 395. Mr. Yates, an officer in chancery, was committed by Mr. Lansing, then chancellor, for malpractice and contempt. One of the judges of the Supreme Court, on *habeas corpus*, discharged Mr. Yates, whereupon the chancellor recommitted him for the same offence. Mr. Yates then sued the chancellor for the penalty given by the *Habeas Corpus* Act of New York, against any one who should knowingly recommit or imprison for the same offence, any person thereby set at large; but the Supreme Court, in an able and exhaustive opinion by Chief Justice KENT, held that the *Habeas Corpus* Act did not intend to alter the rule as to the immunity of judges from suit, and that the action would not lie.

The same principle has been asserted in many other cases, among others, in the recent ones of *Harrison v. Redden*, (Kana.) 36 Pac. Rep. 325, and *Fawcett v. Dole*, (N. H.)

29 Atl. Rep. 693. In *State v. Whitaker*, 45 La. Ann. 1299; S. C., 14 So. Rep. 66, it was held, that though a judge who refuses to grant an appeal in an appealable case, on the ground that the issues raised have been repeatedly determined by the Supreme Court adversely to the party moving for the appeal, and that the applicant was seeking to abuse the right of appeal, acts unjustifiably in so doing, yet, from motives of public policy, he will be protected from liability for resulting costs; and in *Hombert v. Gleason*, 14 N. Y. Suppl. 568, though the mayor of a city refused to proceed with an examination when the accused was brought before him, adjourned the hearing to the following day, and held the accused to bail for his appearance on that day; and then refused to accept the bail tendered by the accused, or to accept any bail until after twenty-four hours, and directed that the accused be locked up until the following day; it was nevertheless decided that he was not liable in damages for having acted thus.

It will be evident from a review of these cases that this rule of the common law often fails to secure justice to a suitor; and it will also be evident, on reflection, that it fails to secure the very object for which, as we have seen, it was intended. While securing the independence of the judges, it also secures to them a license, which, in our days at least, they are not slow to abuse. If judicial officers were always selected as they ought to be, for their ability and probity, such protection might indeed be beneficial to them and to others; but in a state of society in which men are raised to the bench as a reward for their political services, even if those services have involved a violation of the laws, and when incompetent judges are continued in office from term to term, simply because they are useful to their party, it is the public who need protection against them, not they against the public. And descending from generals to particulars, experience has shown that men of this character will be sure to abuse the protection thus afforded, for the gratification of their own private prejudices and enmities. No clearer abuse of judicial power could be shown, than in the cases from New York cited above, in which, in the one case, a chancellor reimprisoned a person discharged

on *habeas corpus*, and a mayor refused either to examine or to admit to bail a person brought before him as a committing magistrate. Equally gross was the abuse in *Anderson v. Gorrie*, [1895] 1 Q. B. 668, which was found by the jury to be a fact. And yet in all these cases, the guilty persons were allowed to go scot-free, out of deference to a worm-eaten rule of the common law. There was another instance of a flagrant abuse of judicial power, which occurred some years ago, in one of the United States. An attorney, who had rendered very important services to a client in a suit over the estate of a decedent, charged, on the settlement of that estate, a sum which the court before which the matter came deemed exorbitant, and, thereupon, instead of reducing it, that learned body refused to allow him any fee whatever. He took an appeal to the Supreme Court; but that, while mildly reproving the court below for its hastiness, said in effect: This was a matter within its discretion. We are very sorry for you, but we can't help you. So he might have gone without his fee, if it had not fortunately happened that his client's share of the estate had been put into his hands. He therefore quietly pocketed his fee, in spite of the court's decree. This coming to the ears of the opposing attorney, he thought he saw an excellent chance for getting even with him, and lost no time in informing the court. That august body then issued an attachment, or something of the kind, against the disobedient attorney, and would have done all sorts of things to him, if several of the leaders of the bar had not offered themselves as his advocates, which made them a little careful. All this took place before the decision of the appeal, mentioned above; and they decided to await that. After it was rendered, they let the case drop. But, if they had not been frightened, they might have gone on and disbarred the attorney, cut him off from his profession, and ruined his life, without the slightest responsibility therefor.

In regard to such facts as these, the oratory of Chief Justice KENT reads like a satire: "No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the

degradation of private prosecution, we subdue their independence, and destroy their authority. Instead of being venerable before the public they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have hitherto been deemed the best guardians of civil liberty."

The good Chief Justice lived in a different age from ours. The bench was venerable then; and it was capable of being degraded. But no private prosecution can degrade a court where the judge sits and reads a newspaper, with his feet on the desk, his mouth full of tobacco, and a spittoon by his side, during the transaction of business; nor one where the judge pats his fat paunch and curses the hours that separate him from dinner, growing more snappish and less mindful of law as his appetite grows; nor one where the judge allows his views of a client's rights to be distorted by his hatred of the counsel; nor one where the judge presides over the trial of a case in which his bitterest enemy is interested. Yet there is not a state in the Union where scenes like these are not to be seen almost daily, and where the grossest injustice is not perpetrated by such means, without any adequate remedy.

Remedies there are, to be sure; but wholly inadequate. Of what use is it to ask a new trial of a court that refused to give you a fair one before? Of what use is it to appeal to a higher court, whose composition is no better, perhaps worse, than that of the court below? And of what use is it to impeach a judge, put in office for political reasons, and kept there by his political influence? Who could successfully impeach a Democratic judge in Texas, a Republican judge in Pennsylvania, or a Dispensary Judge in South Carolina? The idea is almost too absurd to mention.

The only possible solutions of the problem, therefore, if we would improve the administration of justice, are, either (1) To elect to the bench only men of the highest character, in which case no redress will be needed, for no wrong will be done; or (2) To make the judges responsible to the party injured for any damage that may be caused by their corrupt or malicious actions on the bench.

PROFESSOR LANGDELL AND THE HARVARD LAW SCHOOL.

No more interesting event has occurred of late in the world of law than the recent celebration at the Harvard Law School which marked the completion of Professor Langdell's twenty-five years of service in that institution. Professor Langdell's colleagues in the faculty, the graduates of the school, who realize how great a debt they owe to his instruction, the present undergraduates of the school and the University at large gladly embraced the opportunity to do him honor. The assemblage which gathered at Cambridge on June 25th included many eminent lawyers who journeyed thither from a distance. Chief Justice Fuller was ready to add his words of commendation and congratulation to those spoken by the sons of the great University. From across the seas Sir Frederick Pollock had come to deliver the oration of the day, and, as an emissary from the home of the common law, he bore witness to the high esteem in which Professor Langdell's work is held in England. Sir Frederick Pollock must have been impressed by the character of the audience that assembled to greet him. James C. Carter was there, and Joseph H. Choate, side by side with Mr. Justice Brown, of the Supreme Court of the United States, Judge Holmes, of the Supreme Court of Massachusetts, and Secretary of State Olney. Other distinguished lawyers, together with those just mentioned, listened with close attention to the eminent jurist's address on "The Vocation of the Common Law." It has not been, as yet, the writer's good fortune to read the address in its entirety. A more or less complete synopsis of it, with here and there an occasional extract, has appeared in the daily papers, and from this it is evident that the address was worthy of the speaker and of the occasion upon which it was his privilege to speak. Comment upon the address as a whole must be reserved for a future time, but we, at least, may be permitted to point out that there is abundant food for reflection in the circumstance that an Oxford professor was the chief speaker at the anniversary exercises of an American Law School, and that his

address emphasized the unity of common law development in his own country and in ours, while, at the same time, he made most interesting suggestions as to the possibility of securing even greater harmony of development in the future. Those who are familiar with Sir Frederick Pollock's writings will not be surprised that his thought ran along this line. No English legal writer of modern times has made better use of American material or has acknowledged a greater indebtedness to the work of American jurists. It will be remembered that his work on Torts is dedicated to Judge Holmes, (who was himself a colleague of Professor Langdell's before he went upon the bench), and in the letter of dedication prefixed to that work the author seems to have started a chain of thought which he has followed out to its conclusion in the address. In his book on Torts and in his work on Contracts he constantly cites American cases and quotes American authorities, and it may be said with confidence that (unconsciously perhaps) he had done much by his writings to promote that harmony of legal development which he pleads for in his address. It is an interesting subject of speculation as to whether some of the credit for this state of things does not belong to the Harvard Law School and to Professor Langdell. Certainly, it has been from Judge Holmes and other members of the Harvard Faculty, past and present, that Sir Frederick Pollock has drawn what we may speak of as his "American inspiration." If one opens that splendid contribution to the historical literature of English law which he and Professor Maitland have recently published,* one finds at the very threshold a tribute to the original investigations which have been carried forward in the domain of early legal history by members of the Harvard Faculty. "At other points, again," the authors say in their introduction, "our course has been shaped by a

* *The History of English Law before the time of Edward I.*, by Sir Frederick Pollock, Bart., M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, of Lincoln's Inn, Barrister-at-Law, and Frederic Williams Maitland, LL.D., Downing Professor of the Laws of England, in the University of Cambridge, of Lincoln Inn, Barrister-at-Law, Cambridge; at the University Press. Boston: Little, Brown & Co. 1895. (Two Volumes.)

desire to avoid what we should regard as vain repetition. When the ground that we traverse has lately been occupied by a Holmes, Thayer, Ames or Bigelow, by a Brunner, Liebermann or Vinogradoff, we pass over it rapidly." Of the four Americans mentioned in this list, the first three are or have been members of the Faculty of the Harvard Law School, and Professor Bigelow is carrying on his work almost under the shadow of Harvard's walls. A closer examination of the history of English law reveals the fact that it is through the pages of the *Harvard Law Review* that much of the most valuable work of these scholars has become known to their English brethren. It is not surprising, therefore, to find Sir Frederick speaking as follows in his recent address:

"There is one product of school, however, that stands apart and can be judged on its independent merits; I mean the *Harvard Law Review*. This review has been in existence only a few years, yet within that time its contributions to the history and science of our law have been of the utmost value. This is so far from being controvertible that it can hardly be called matter of opinion at all. No such record of profitable activity has been shown within recent times by any other law school; and although it is not necessary to commit one's self to the correctness of this statement beyond the range of English-speaking countries, I do not know that there would be any great rashness in making it universal. The singularly full and brilliant number of the review published in honor of Dean Langdell's silver wedding with the school need not fear comparison with the festival collections of essays produced at any German university. The school that commands the services of such teachers and workers is, at all events, a living power."

The reference is to the May number of the *Harvard Law Review*, which was issued as the "Langdell Twenty-fifth Anniversary Number," each of Prof. Langdell's colleagues upon the Faculty making a contribution to it. The writer ventures the assertion that never before within the brief scope of ninety pages have essays of equal merit been given to the public. The list of essays, with their authors, is as follows:

"A Chapter of Legal History in Massachusetts," J. B. Thayer;
 "The Use of Maxims in Jurisprudence," Jeremiah Smith;
 "Judicial Precedents: A Short Study in Comparative Jurisprudence," J. C. Gray; "Executors," O. W. Holmes;
 "Specialty Contracts and Equitable Defences," J. B. Ames;
 "A Problem as to Ratification," Eugene Wambaugh; "The Risk of Loss after an Executory Contract of Sale in the Civil Law," Samuel Williston; and "Recovery for Consequences of an Act," J. H. Beale, Jr.

The Dedication is as follows:

TO
 C. C. LANGDELL,
 in honor of
 HIS GENIUS AS A LAWYER,
 HIS ORIGINALITY AS A TEACHER OF LAW,
 HIS SAGACITY AS A LAW-SCHOOL ADMINISTRATOR,
 and
 HIS DEVOTED AND SUCCESSFUL SERVICES AS DEAN AND PROFESSOR
 DURING THE LAST TWENTY-FIVE YEARS.
 The following essays
 ARE INSCRIBED, WITH CORDIAL REGARD, BY HIS PRESENT
 AND FORMER COLLEAGUES IN THE FACULTY
 OF THE HARVARD LAW SCHOOL.

But after all, this celebration of Professor Langdell's twenty-fifth anniversary has its deepest significance for those who have made the methods of legal education the subject of anxious study. They cannot fail to hear in the praises which are echoing and re-echoing about Professor Langdell the triumphal song of the system of legal instruction of which, in this country, he has been the champion. It is not to be expected that there could be a serious difference of opinion among those who deserve to be called scholars as to the true method of investigating historical problems, and of studying progressive developments in the domain of law. At the same time, it is gratifying to have a specific statement on this subject from Sir Frederick Pollock, and we therefore commend the following extract from his address to the consideration of our readers:

"Mr. Langdell has insisted, as we all know, on the importance of studying law at first hand in the actual authorities. I am not sure whether this is the readiest way to pass examinations: that is as the questions and the examiners may be. I do feel sure it is the best way, if not the only one, to learn law. By pointing out that way, Mr. Langdell has done excellently well. But the study he has inculcated by precept and example is not a mere letter-worship of authority. No man has been more ready than Mr. Langdell to protest against the treatment of conclusions of law as something to be settled by mere enumeration of decided points. For the law is not a collection of propositions, but a system founded on principles; and although judicial decisions are in our system the best evidence of the principles, yet not all decisions are acceptable or ultimately accepted, and principle is the touchstone by which particular decisions have to be tried.

"Decisions are made; principles live and grow. This conviction is at the root of all Mr. Langdell's work, and makes his criticism not only keen, but vital. Others can give us rules; he gives us the method and the power that can test the reason of rules. And, therefore as it seems to me, his work has been of a singularly fruitful kind, and profitable out of proportion to its visible bulk. Probably several of us have dissented, now and again, from this or that opinion of Mr. Langdell. We may have been unable to concur in his deduction, or we may have thought that his reasoning was correct, but the received authorities were too strongly against him, and that he must be content as standing as the Cato of a vanquished cause. But none of us, I think, has ever failed to learn something even when he could not follow. For my own part I have considered and reconsidered much of Mr. Langdell's criticism; I have more than once, on a second or third time or reflection, come round to think with him; at all times, whether going side by side with Mr. Langdell or withstanding him, I have felt, and the feeling has grown upon me with ripper acquaintance, that appreciation of his point of view was sure to bring one nearer the heart of the common law."

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MIRS v. STATE.¹ COURT OF CRIMINAL APPEALS OF TEXAS.
MARCH 2d, 1895.

A person illegally arrested, even though he has acquiesced in the arrest, may use such force as is necessary to regain his liberty, and if there is reasonable ground to believe that the officer intends to shoot to prevent his escape, may shoot the officer in self-defense.

WHEN THE KILLING OF AN OFFICER WHO IS MAKING AN ILLEGAL ARREST IS JUSTIFIABLE.

The general principle is that where the deceased had the authority to make the arrest and was resisted and killed while in the proper exercise of such authority, the killing will be murder, but where the arrest was illegal, and the killing was done in the passion caused by such illegal taking into custody, the offence is reduced to manslaughter: *Foster*, 270, Hale's P. C. 465, and *Rafferty v. People*, 69 Ill. 115 (1873).

Where the process was regular the defendant should have submitted, and the law will not excuse him for taking life, but where an officer attempts to put an illegal restraint upon the defendant, even if "attempted in a manner free from violence" or the exercise of harsh measures in effecting it," the law considers such circumstance, though it fall short of a justification, as establishing such a provocation as may, on account of the excitement occasioned thereby, so far excuse the act as to reduce the crime to manslaughter: *R. v. Patience*, 7 C. & P. 775 (1837); *R. v. Chapman*, 12 Cox C. C. 4 (1871), and *Briggs v. Com.*, 82 Va. 554 (1886).

¹ Reported in 29 S. W. Rep. 1074.

In this class of cases it will be seen, by reading the authorities, that the person arrested or attempted to be arrested, made use of more force than was necessary to obtain his liberty and that the killing of the officer was not at all requisite to the attainment of the object desired.

In the principal case, however, the deceased, who was a constable, was killed by the defendant while the latter was attempting to escape from an illegal arrest and at a time when he believed that he would be shot by the deceased, who was pointing a loaded gun at him, if he did not fire first.

The decision seems to be in consonance with the authorities, which are not numerous, and with sound reason. The deceased had made an arrest which he had not the least authority to do and, having taken the prisoner into custody, was endeavoring to prevent the latter from exercising that right of liberty which is inherent in all men and which cannot be abridged except by due process of law. This attempt of the officer was backed up by a deadly weapon and was resisted in a like manner with the result as noted above. In other words, the defendant merely presented "force to force."

The judge of the court below in his charge to the jury had said, "But if a person submit to arrest and acquiesces in the authority of the officer to make the arrest, he waives every objection or right he may have made to any irregularity or illegality in the same on the arrest; and if thereafter he breaks away from the officer he acts unlawfully and, in a conflict between him and the officer consequent thereon, he, in law, would be the aggressor."

This charge was held by the Court of Appeals to be not only "Not law, but an outrage upon law. A citizen is illegally arrested without resistance. He attempts to regain his liberty by flight. He is the aggressor if he should shoot the trespasser to save his own life—shoot and kill, the very man who was and had been in the very act of killing him, because he was attempting to release himself from the, in law, real aggressor."

Continuing the court said that "Being wrongfully and illegally deprived of his liberty, appellant had the same right

"to regain it, and right to use the same means, force or resistance, as he had in preventing an illegal arrest. Being falsely imprisoned he had the right to his liberty, and, for the purpose of obtaining it, could use all force necessary for that purpose, taking care to use no more than was required. What degree of violence is necessary always depends upon that used or attempted by his adversary. To illustrate: A. is illegally arrested, and attempts to regain his liberty. His adversary proposes to prevent this by the use of deadly weapons. A. may resort to such weapons. A. flees from such arrest. The officer presents in a shooting position, his gun, demanding him to halt. A. can shoot if it reasonably appears to him that the officer will shoot."

This is in accordance with the law as laid down by the court in *Alford v. State*, 8 Tex. Ap. 566 (1880), where it was said that the right of resistance is not limited to the actual caption, but continues to the cessation of the unlawful detention, and the party detained or some other person in his behalf can, under such circumstances, "use all the force adequate to resist the aggression and effect the liberation, even to the extent of taking life, if that be essential; and a homicide perpetrated for that purpose alone cannot be regarded as culpable."

In Wharton on Homicide, § 227, it is said, that if A. unlawfully attempts to arrest B., the latter is justified in resisting, and if he is so pressed by A. as to make it necessary to choose between submission and killing A., then the killing is not even manslaughter. So, if A.'s assault has mixed in it a felonious intent, then B., if necessary to avert the danger, may take A.'s life.

And in *Crichton v. Com.*, 83 Ky. 142 (1885), and *State v. Underwood*, 75 Mo. 230 (1881), we find it stated that a person who is being illegally arrested has a right to take the life of the person so attempting, if it is necessary to save his own life or his person from great bodily harm.

In other words, if the arrest be without lawful authority and the resistance is only such as is provoked by, and in due proportion to the assault, and the killing is not malicious, it would not be criminal: *State v. Niles*, 26 Ala. 31 (1855); *State v.*

Oliver, 2 Houston, 604 (1863), and *State v. Schrele*, 57 Conn. 307 (1889).

We will now review a few of the authorities which seem to support the decision in the principal case.

In *Ross v. State*, 10 Tex. Ap. 455 (1881), the deceased, who was a town marshal, endeavored illegally to take a gun from the defendant under the pretense that it was contrary to law to carry one, and, when prevented from doing so, fired a shot. Defendant then shot at deceased and killed him.

HART, J., in delivering the opinion of the court, said, "The citizen has the right to maintain his liberty at all hazards, against any and all persons who attempt to invade it unlawfully, taking care not rashly to use or resort to greater violence than is necessary to its protection. Again, being in the right, he is permitted to anticipate the aggressor and prepare himself by drawing a weapon, or making any other preparations, and if his life is imperiled or he is in danger of serious bodily harm, to use every means in the defence of his person or liberty. He is not required to permit his assailant to take the lead, and thereby give him the advantage, but, if the surroundings indicate a resort to a serious or deadly conflict on the part of the adversary, he can prepare to meet it, and if the adversary makes demonstration upon his life or liberty, or shows an intent to inflict serious bodily harm upon him, he can kill him and be held blameless by the law of the land."

In *Jones v. State*, 26 Tex. Ap. 1 (1888), the deceased, who was a deputy sheriff of Llano county, went into San Saba county to serve a warrant on the defendant. Defendant was in bed, and deceased called to him and said he had a paper for him. Defendant came down stairs in a few minutes and deceased said, "shall I read the paper, or shall you read it." Defendant said he would read it. Upon reading it he said to deceased that he would not go with him, when deceased said "You won't?" and threw up his pistol and fired. Defendant immediately fired at deceased and killed him. The shots were almost simultaneous.

Held, that the sheriff had no right to serve a warrant out-

side his county, and that the attempted arrest was therefore illegal.

The court said that as deceased had made an unlawful attack upon the defendant, reasonably calculated to create in a man of ordinary mind a belief that deceased was about to inflict on him death or serious bodily injury, the right of defendant to kill in such case was complete.

In *Alford v. State, supra*, a warrant was made out in the name of John Smith, and then defendant's name illegally inserted by an officer, who was killed while attempting to arrest the defendant.

The court said that an unlawful arrest is a continuous assault, of an aggravated character, and the right of resistance thereto is not limited to the time at which it is attempted or accomplished, but continues throughout the unlawful detention and may be exercised not only by the person detained, but by another in his behalf, and with the force requisite to effect the release of the person so detained. A homicide which results from the use of such force is not culpable.

In *Tiner v. State*, 44 Tex. 128 (1875), the defendant, who was guilty of a misdemeanor, was ordered to halt while riding through the streets of a city at night by two men, whom he did not know to be policemen. He refused to do so, and on seeking to avoid them was fired at. He returned the fire and killed one of them.

The court held that as the officer had shot at him while attempting to make an illegal arrest, and when no resistance had been offered, and when the life of the officer was not in danger, that the defendant could protect himself in the same manner as he could against an ordinary citizen under like circumstances, and that if he killed the officer in the defence of his life he was not culpable.

In *Dyson v. State*, 14 Tex. Ap. 454 (1883), A. and B., his brother, were peaceably walking together when C. rushed up with a drawn pistol, and, with oaths and violence, attempted illegally to arrest A. He resisted and during the scuffle C.'s pistol was discharged, and B. then drew his revolver and killed C.

Held, that if it reasonably appeared to B. that it was necessary to kill C. in order to liberate A. the homicide was justifiable.

To sum the whole matter up, if the person illegally restrained of his liberty uses no more force than is necessary to obtain his freedom, and only shoots as a last resort, he will not be held accountable before the law.

C. PERCY WILLCOCK.

AMERICAN SUGAR REFINERY CO. v. FANCHER.

(This case, reported in Northeastern Reporter, Vol. 40, page 206, was recently decided by the Court of Appeals of New York. The question involved is one of such importance to the business community and one which has been regarded as doubtful for so long, that we print the decision in full, the facts appearing sufficiently in the learned judge's opinion.)

Appeal from Supreme Court, General Term, First Department.

Action by the American Sugar Refining Company against Charles H. Fancher, assignee. From a judgment of the General Term (30 N. Y. Supp. 482), reversing a judgment for plaintiff, plaintiff appeals. Reversed.

Charles E. Hughes, for appellant. James B. Dill, for respondent.

ANDREWS, C. J.—This case presents a question of considerable practical importance. It relates to the equitable jurisdiction of the court, under special circumstances, to follow proceeds of personal property in the hands of a fraudulent vendee or his general assignee for the benefit of creditors at the suit of a defrauded vendor, who by false pretenses was induced to part with the property upon credit, the proceeds sought to be reached being the sums due from subvendees of the fraudulent purchaser arising on resales by him made before the discovery by the plaintiff of the fraud. The facts upon which the question arises are substantially conceded and are free from complication. Between the 20th day of September, 1892, and the 20th day of October following, the plaintiff sold and delivered to the mercantile firm of C. Burkhalter & Co., doing business in the city of New York, sugars of various qualities on credit for the price in the aggregate of \$19,121.41, no part of which has been paid, the last sale

having been made October 19, 1892. On the next day the firm, being insolvent and owing debts greatly in excess of its assets, made a general assignment to the defendant for the benefit of its creditors. Among the assigned assets were a portion of the sugars sold by the plaintiff to the firm, which he replevied from the assignee; but the firm, prior to the assignment, had sold to numerous persons, customers of the firm, in the ordinary course of trade, portions of the sugars on credit, and claims held by the firm against the subvendees arising out of such sales, exceeding in the aggregate the sum of \$10,000, were among the assets which passed by the assignment. These claims were collected by the assignee after the assignment, and (excepting a small sum) after notice had been served by the plaintiff on the assignee that it rescinded the original sale for fraud, which notice was accompanied by a demand for the sugars then in the possession of the assignee, and for an accounting and the delivery to the plaintiff of the outstanding claims against the customers of Burkhalter & Co. in their hands for the sugars sold by the firm as above stated. The assignee declined to accede to the demand made. On the trial the parties by stipulation fixed the amount of the claims for sugars sold which had come to the hands of the assignee, and which had been collected by him. The fraud of Burkhalter & Co. was not controverted. It was shown that the sales were induced by a gross misrepresentation in writing made by one of the members of the firm to the plaintiff as to the solvency of the firm, made on or about September 20, 1892, within 30 days before the assignment, and when the firm was owing several hundred thousand dollars more than the value of its whole assets.

The case presented is singularly free from any uncertainty in respect to the facts upon which the equitable jurisdiction to follow the proceeds of the sugars is claimed. They are definite and ascertained, but it is insisted that the court is impotent to give relief by way of subjecting the choses in action or their proceeds, representing the sugars, to a lien in favor of the defrauded vendor, or to adjudge that they shall be applied in partial recompense and restitution for the

property so wrongfully obtained, because, as is claimed, such relief is not in any such case within the scope of the powers of courts of equity as heretofore defined and exercised, and for the further reason that new rights have intervened by reason of the assignment. The fraud of Burkhalter & Co. was, as we have said, admitted. They are hopelessly insolvent, and were so at the time they took plaintiff's goods. They disposed of a large part of the sugars before the plaintiff became cognizant of the fraud. The plaintiff was only apprised of it after the assignment was made. The remedy at law upon the contract against the fraudulent and insolvent purchaser is, under the circumstances, ineffectual. The pursuit of the property, except the small part of it which was unsold and passed to the assignee, is impracticable. If it could yet be found unconsumed and capable of identification, the multiplicity of suits which would be rendered necessary to reclaim it would make the remedy expensive, burdensome and inadequate. The identification of the proceeds sought to be reached is complete and unquestioned. It is not claimed that the credits or the money into which they have been converted are not the very proceeds of sugars of which the plaintiff was defrauded.

The jurisdiction of a court of equity to follow the proceeds of property taken from the true owner by felony, or misapplied by an agent or trustee, and converted into property of another description, and to permit the true owner to take the property in its altered state as his own, or to hold it as security for the value of the property wrongfully taken or misapplied, or, in case the original property or its proceeds have been mingled with that of the wrongdoers in the purchase of other property, to have a charge declared in favor of the person injured to the extent necessary for his indemnity, so long as the rights of *bona fide* purchasers do not intervene, has been frequently exerted, and is a jurisdiction founded upon the plainest principles of reason and justice. The case of *Newton v. Porter*, 69 N. Y. 133, is an illustration of the application of this principle in a case of the larceny of negotiable bonds, sold by the thieves, in which the court subjected securities in

which they invested the money, and which they had transferred with notice to third persons as security for services to be rendered, to a charge in favor of the owner of the stolen bonds. The cases upon this head are very numerous, where there has been a misapplication of trust funds by trustees, or persons standing in a fiduciary relation, and the money or property misapplied has been laid out in land or converted into other species of property. The court in such cases lays hold of the substituted property and follows the original fund, through all the changes it has undergone, until the power of identification is lost or the rights of *bona fide* purchasers stop the pursuit, and holds it in its grasp to indemnify the innocent victim of the fraud. And even in case of money, which is said to have no earmark, its identity will not be deemed lost, though it is mingled with other money of the wrongdoer, if it can be shown that it forms a part of the general mass: *Pennell v. Deffell*, 4 De Gex, M. & G. 372; *In re Hallett's Estate*, 13 Ch. Div. 696; *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205. In the cases of stolen property, or of misapplication by a trustee or agent of the funds of the principal or *certain que trust*, the title of the real owner of the property has been in most cases lost, without his consent, and the court, by a species of equitable substitution, repairs, as far as practicable, the wrong, and prevents the wrongdoer from profiting by his fraud.

And, indeed, courts of law, borrowing the equitable principle, in cases of misappropriation by agents, vest in the principal at his election the legal title to a chattel or security in the hands of the agent, purchased exclusively by the application of the embezzled or misappropriated fund: *Taylor v. Plumer*, 3 Maule & S. 362. It is at this point that the controversy in the present case commences, and the divergence arises which has led to this litigation. It is claimed, on behalf of the defendant, that courts of equity in commercial cases, where the claim of the plaintiff originates in a fraud in the sale of personal property, do not undertake to follow proceeds in the hands of the wrongdoer, but that the defrauded party, having consented to part with his title, is remitted exclusively to such legal reme-

dies as are given for the redress of the wrong. The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been and ought not to be extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency. It cannot be denied that the protection of *cestuis que trustent* against frauds of the trustee is an object of peculiar solicitude in the courts of equity. They, in many cases, are incapable, by reason of age, inexperience, or other incapacity, from looking out for themselves, and the court stands in the attitude of guardian of their interests. But, as has been said, a court of equity does not restrict its remedial processes to the aid of the helpless or the ignorant. It embraces within its view the general claims included within what are called *quasi* trusts, and intervenes to prevent violations of equitable duty by whomsoever committed or whoever may suffer from the violation. It goes altogether outside of trust relations in many cases to prevent fraud, or to compel a restoration of property obtained by fraud. The exercise of the jurisdiction to set aside fraudulent transfers of real or personal property made in fraud of creditors is familiar. And the jurisdiction is most beneficially invoked in cases of private fraud to rescind transfers of real estate procured by fraudulent representations, and to restore to the defrauded vendor the title of which he has been defrauded. It often happens in cases of transfers of real estate procured by fraud that, before the action is brought or the plaintiff is apprised of the fraud, the fraudulent vendee has disposed of the land in whole or in part, or has created liens thereon in favor of the *bona fide* purchasers for value. In such cases the court will mold the relief to suit the circumstances, and will, at the election of the plaintiff, rescind the contract and compel a reconveyance of the part of the land

still remaining in the hands of the vendor, and compel the wrongdoer to account for the proceeds of the land sold, or award compensation in damages. The court in many cases resorts to the fiction of a trust, and, by construction, adjudges that the proceeds in the hands of the wrongdoer are held by him as trustee of the plaintiff. This was the exact nature of the relief granted in the case of *Trovelyan v. White*, 1 Beav. 589, as appears by the recital of the decree in the opinion of the master of the rolls, where part of the estate had been sold by the fraudulent vendee. In *Cheney v. Gleason*, 117 Mass. 557, a bill was filed by the defrauded vendor of real estate to reach a mortgage taken by the vendee on the land on a resale by him, and the court sustained the bill and granted the relief. In *Hammond v. Pennock*, 61 N. Y. 145, the court rescinded, at the instance of the plaintiff, a contract for the exchange of real and personal property, owned by the plaintiff, for a farm of the defendant in Michigan, which had been consummated on the plaintiff's part by a conveyance and transfer, the contract and conveyance having been obtained by the defendant by fraudulent representations; and the defendant having, after the conveyance to him, contracted to sell part of the land conveyed to him by the plaintiff, the court adapted the relief to the circumstances, and rescinded the conveyance so far as practicable, and adjudged that the defendant account for the proceeds of the personal property included in the sale.

If the jurisdiction exercised by courts of equity in respect to undoing fraudulent conveyances of real estate, and following the proceeds in the hands of the fraudulent grantee, appertains in like manner and degree to sales of personalty, it would seem that the plaintiff in the present case was entitled to relief. The fact that, before the action was brought, Burkhalter & Co. had made a general assignment for the benefit of creditors to the defendant is no obstacle to the relief, if, except for the assignment, the court would have interposed, on the prayer of the plaintiff, its preventive and other remedies, to have enabled the plaintiff to reach the unpaid claims against the subvendees. An assignee for creditors is not a purchaser

for value, and stands in no other or better position than his assignor as respects a remedy to reach the proceeds of the sales by Burkhalter & Co.: *Goodwin v. Wertheimer*, 99 N. Y. 149, 1 N. E. 404; *Barnard v. Campbell*, 58 N. Y. 76; *Ratcliffe v. Sangton*, 18 Md. 383; *Bussing v. Rice*, 2 Cash. 48. It is claimed that the general creditors of the firm will be prejudiced if the plaintiff is allowed to prevail, and that he will thereby acquire a preference over the other creditors of the insolvent firm. But general creditors have no equity or right to have appropriated to the payment of their debts the property of the plaintiff, or property to which it is equitably entitled as between it and Burkhalter & Co.

They, so far as appears, advanced nothing, and gave no credit on the faith of the firm's possession of the sugars, assuming that that element would have had any bearing on the case. If the sugars had existed in specie in the hands of the assignee, it cannot be doubted that the plaintiff on rescinding the sale would have been entitled to retake them, and the general creditors are in no worse position, if the plaintiff is awarded the proceeds, than they would have been if the sugars had remained unsold. Much was said on the argument upon the difference between a trespasser taking and disposing of the property of another and the case of a sale of personal property to a vendee induced by fraud. It is the law of this state, as in England, that title passes on such a sale to the fraudulent vendee, notwithstanding that the crime of false pretenses is included in the statute definition of a felony, but which was not such at common law: *Barnard v. Campbell*, *supra*; *Wise v. Grant*, 140 N. Y. 593, 35 N. E. 1078; *Benj. Sales* (6th Ed.) § 433; *Fassett v. Smith*, 23 N. Y. 252; *Benndict v. Williams*, 48 Hun, 124. But a purchase procured by fraud is in no sense, as between the vendor and vendee, rightful. It was wrongful, and, while a transfer so induced vests a right of property in the vendee until the sale is rescinded, the means and act by which it was procured was a violation of an elemental principle of justice. But the rule is that a sale of personal property induced by fraud is not void, but is only voidable on the part of the party defrauded. "This

does not mean that the contract is void until ratified; it means that the contract is valid until rescinded." When a contract of sale is infected by fraud of the vendee is consummated, and the property delivered, the vendor on discovering the fraud may pursue one of several courses. He may affirm the contract, and an omission to disaffirm within a reasonable time after notice of the fraud will be deemed a ratification. He may elect to rescind it, and thereby his title to the property is reinstated as against the purchaser and all persons deriving title from him, not being *bona fide* purchasers for value, and a purchaser is not such who takes the property for an antecedent debt, or who purchased the property on credit, and has not paid the purchase money or been placed in a position where payment to a transferee of the claim cannot be resisted: *Barnard v. Campbell*, *supra*; *Dows v. Kidder*, 84 N.Y. 121; *Matson v. Melchor*, 42 Mich. 477, 4 N.W. 200; 1 Benj. Sales, p. 570, note.

Upon rescission the vendor may follow and retake the property wherever he can find it, except in the case mentioned, or he may sue for conversion. When these legal remedies are available and adequate, clearly there is no ground for going to a court of equity. The legal remedies in such case are and ought to be held exclusive. But in a case like the present, where there is no adequate legal remedy, either on the contract of sale or for the recovery of the property in specie, or by an action of tort, is the power of a court of equity so fettered that where it is shown that the property has been converted by the vendee, and the proceeds, in the form of notes or credits, are identified beyond question in his hands, or in possession of his voluntary assignee, it cannot impound such proceeds for the benefit of the defrauded vendor? The only reason urged in denial of this power which to our minds has any force is based on the assumption that it would be contrary to public policy to admit such an equitable principle into commercial transactions. But with the two limitations adverted to, and which ought strictly to be observed, (1) that it must appear that the plaintiff has no adequate remedy at law, either in consequence of insolvency, the dispersion of the

property, or other cause, and (2) that nothing will be adjudged as proceeds except what can be specifically identified as such, business interests will have adequate protection. Indeed, the disturbance would be much less than is now permitted in following the property from hand to hand until a *bona fide* purchaser is found.

The case of *Small v. Attwood, Younge*, 507, is a very instructive case, which involved a large amount, was argued by eminent counsel, and received great consideration. It supports, we think, the equitable jurisdiction invoked in the present case. It was an action by the purchaser to rescind a contract for the sale of mines and mining property induced by fraudulent representations, and to recover the purchase money paid to the amount of about £200,000. The court found the fraud and rescinded the contract, and made a decree for an accounting. On a supplemental bill being filed, showing that the purchase money paid had been invested by the seller in public securities in his name, which he afterwards caused to be put in the name of his mother, and that the purchaser had no other means adequate to repay the purchase money, the chancellor, on an application for an injunction restraining the transfer of the securities, held that the money paid could be followed into the stock purchased, and granted the injunction. The case of *Cavin v. Glason*, 105 N.Y. 256, 11 N. E. 504, was an attempt to fasten upon the estate of an insolvent a preferential lien for money put into his hands by the plaintiff for the purchase of a mortgage for her, and which he applied, without authority, to the payment of his debts before the assignment, with the exception of a small sum (\$30), which went into the hands of the assignee. The court held that the money, which the insolvent had used to pay debts prior to the assignment, was not a preferred debt, but sustained her right to be paid the small sum which the assignee received belonging to the trust. This case points the distinction. The character of the debt gave it no priority. The fund had been dissipated, and could not be traced among the assigned assets. There was no equitable ground of preference except for the small sum mentioned.

Upon the whole case, we are of the opinion that the judgment on the report of the referee was correct, and the order granting a new trial should therefore be reversed, and the judgment on the report of the referee affirmed, with costs. Judgment accordingly. All concur.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 735 Second Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. By SIR FREDERICK POLLOCK, Bart., M.A., LL.D., and FREDERIC WILLIAM MAITLAND, LL.D. Two Volumes. Cambridge: The University Press. Boston: Little, Brown & Co. 1895.

ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA. By CHARLES BORGEAUD. Translated by CHARLES D. HAZEN. New York: Macmillan & Co. 1895.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SKYMOOR D. THOMPSON, LL.D. In Six Volumes. Vols. I-III. San Francisco: Bancroft-Whitney Co. 1895.

A MANUAL OF PUBLIC INTERNATIONAL LAW. By THOMAS ALFRED WALKER, M.A., LL.D. London: Clay & Sons and Stevens & Sons, Limited. New York: Macmillan & Co. 1895. Cambridge: The University Press.

HAND-BOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY. St. Paul: West Publishing Co. 1895. (No. 5, Hornbook Series.)

THE UNITED STATES INTERNAL REVENUE TAX SYSTEM. Edited by CHARLES WESLEY ELDRIDGE. Boston and New York: Houghton, Mifflin & Co. Riverside Press, Cambridge. 1895.

SELECTED CASES, ETC.

AMERICA RAILROAD AND CORPORATION REPORTS, Annotated. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

PAMPHLETS.

THE QUIZZER SERIES. Nos. 8 and 9. Questions and Answers on Common Law Pleading (No. 8). By GRIFFITH OGDEN ELLIS and EMIL W. SNYDER. Questions and Answers on Corporations (No. 9). By WM. C. SPRAGUE. Detroit: The Collector Publishing Co. 1895.

UNIFORM STATE LEGISLATION. By FREDERIC J. STIMSON. A Paper Submitted to the American Academy of Political and Social Science. Publication No. 145, of the American Academy of Social Science, Philadelphia. 1895.

BOOK REVIEWS.

A PRACTICAL TREATISE UPON THE LAW OF JUDICIAL WRITS AND PROCESS IN CIVIL AND CRIMINAL CASES. By WILLIAM A. ALDERSON, of the New York Bar. New York: Baker, Voorhis & Co. 1895.

This most interesting volume is, we believe, the first complete survey that has been made of the law of process. Other writers have entered the field from one or more directions, but Mr. ALDERSON has traversed the entire territory, and, as the result of his investigations, has given us a philosophical treatise covering all that is included in his subject.

After a brief historical review of process at the Roman and early English law, he states his definition of the word "writ." He says, it is "an instrument in writing, in an epistolary form, running in the name of the sovereign of a State, issued out of a court of justice or by a judge thereof at the commencement of an action or at any time during its progress, or incident thereto, usually under the seal of the court, duly attested, and directed to some ministerial officer or to the party to be bound by it, commanding the commission of some act at or within a time specified, or prohibiting the doing of some act." If space permitted we could dissect this carefully considered definition, and show how wonderfully Mr. ALDERSON'S entire subject is bound up in embryo, as it were, within its terms.

In discussing the validity of process, he contributes a valuable commentary on the term "void" and "voidable," showing the frequency with which, in this connection, the words have been abused. He treats with liberality and common sense the questions of whether the imperfect styling, and the absence of signature or seal, should be allowed to invalidate a writ, and he uses as his text the words of Judge Jenkins in *Welf v. Cook*, 40 Fed. Rep. 432, to the effect that though a certain amount of ceremonial may be necessary to assist the human mind, "formality should never be permitted to work injustice or deny substantial right."

In treating of "Service on Corporations," the author repudiates the doctrine of his native State (New York) to the effect that a foreign corporation may be served by serving an officer thereof who is inside the jurisdiction solely on his own account, the cause of action not having arisen and the corporation doing no business, within the limits of the jurisdiction. The Federal authorities, and indeed the majority of the State decisions, favor the view taken by the author, and it is to be observed that the Supreme Court of the United States has lately, and since the publication of his book, fortified its former position on the question : *Goldey v. Morning News*, 15 Sup. Ct. Rep. 559.

His discussion of the rule exempting parties and witnesses from service will be found particularly interesting. He heartily approves the position early taken by the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Parker v. Hotchkiss*, 1 Wall. Jr. 269. That decision, it will be remembered, extended the privilege of exemption to the case of a service by summons, as well as to the case of an arrest by *capias*, and though the decision was rendered in the teeth of an opinion by Judge Washington who, forty years before, had followed the practice of the English courts, it has to-day in its support the weight of American authority.

Finally,—for we have not space to give even an outline of the book, we would call attention to the author's valuable chapters on the Rights and Liabilities of Officers in the Execution of Process, Property Subject to Process, and the Return of Process. His exhaustive treatment of the first of these subjects is enough in itself to recommend the book to all Sheriff's and Marshall's Solicitors throughout the country, while his collation and criticism of the authorities under the two other heads, give ample proof of his industry as a student and ability as a lawyer.

While Mr. ALDERSON's research is thorough and profound, he never allows himself to wander out of the straight path before him. His sense of relevancy is always unerring and acute. His style is lucid and direct, and his statement of a case, while it is always succinct, is never so succinct as to be

obscure. Like a skilful draughtsman, he is seldom mistaken in his outline; he sees clearly the principle that underlies a given precedent, and, as in his mind's eye he strips the case of unnecessary clothing, he is able to present it with boldness and precision.

We cannot too much commend the rigid separation which he always observes between the results of the cases and his own opinions. Whenever he approaches a subject as to which there is a conflict of authorities, he is careful to lay both sides before the reader, first one side and then the other, and then in a paragraph headed "*Same subject—Author's views*," he restates the problem boldly and gives his own conclusions. We can say truthfully, and without fear of contradiction, that in these paragraphs headed "Author's Views" is to be found the most valuable portion of his work.

We hope that we have dwelt long enough on the philosophical side of Mr. ALDERSON'S book to make the student wish to read it. The theoretical knowledge of the law of process, which, as we have been told, enabled Judge Cadwalader, while at the bar, to dispense, if he chose, with the printed forms and to draw a writ off hand on a piece of blank foolscap paper, was, after all, part of that profound knowledge of the law which made him subsequently one of the most distinguished of our jurists. Such a theoretical knowledge of the law of process is apparent on every leaf of this most valuable treatise. We should not, however, do the author justice, did we not equally extol the practical aspect of his work. The every-day importance of the subject and the practical handling which it has received, will, we believe, secure to the book a place in the library of every active lawyer.

FRANCIS FISHER KANE.

HANDBOOK OF CRIMINAL PROCEDURE. By WM. T. CLARK, JR.,
Author of Clark's Handbook of Criminal Law, Etc. St. Paul,
Minn.: West Publishing Co. 1895.

This admirable little volume forms an excellent companion to the Handbook of Criminal Law, issued some months ago by the same author; and what was said in praise of that book

applies equally to this. Here the practitioner may find in compact form all that is really necessary for practice in the trial of criminal cases; and he will find it decidedly to his advantage to have it always at his hand.

The author is very clear and positive, as usual, in his statements of the law, and less bound by authority than by the dictates of his own reason. For example, in speaking of extradition, after having mentioned the fact that there is a conflict on the question whether or not a person illegally arrested in a foreign country can be legally tried in the country to which he is brought, he very wisely adds, that in reason, it would appear that the person arrested should not be allowed to raise any objection, though an objection coming from the authorities of the country from which he was abducted should be regarded :—a distinction which does not seem to be stated, at least in such a concise manner, in any reported case.

There are, however, a few slight inaccuracies, or rather deficiencies, to be found in this volume. Such is the omission, in the discussion of the admissibility of dying declarations, to state that a declaration, made when not in fear of impending death, and therefore inadmissible, becomes admissible afterward, if reaffirmed when in expectation of death; this is so, whether the former declaration is first reread or repeated to the deceased, and then reaffirmed or assented to by him: *Rey v. Stull*, 12 Cox C. C. 168; or if simply reaffirmed, though not repeated or reread: *Johnson v. State*, (Ala.) 16 So. Rep. 99.

But these flaws are too trifling to impair the value of the work as a whole; and the Bar may feel assured that in this, as in the other volumes of this series, they will have a most useful volume for the table, to be kept at hand for constant reference,—and one that will rarely, if ever, disappoint them when they consult it. X.

HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK.
By ROBERT LUDLOW FOWLER. New York: Baker, Voorhis
& Co. 1895.

The subtitle of this work, "An Essay Introductory to the Study of the New York Revised Statutes," explains the purpose of the author as he would have it understood. The nine chapters of the book may be roughly divided into two parts, the first four are historical in character, while the last five are devoted to a concise discussion of some of the technical questions arising in modern conveyancing under the New York code. The work, therefore, is of local rather than general interest, but in the historical portions there are several discussions which are of importance upon questions of Colonial Law. Prior to 1664 the States General of Holland, through the Dutch West India Company, had exercised sovereign powers over that portion of the country then known as New Netherland, hence a view of the land law of New York involves a consideration of the grants of the Dutch West India Company. With the English occupation under the Duke of York's patent a number of questions arise, for example, as to whether England's title to New York was derived through the right of discovery and occupation, or by means of conquest and cession. The author treats, at some length, the Common Socage tenure by which the lands were held of the Crown, leading up to a discussion of the recent important case of *De Lancey v. Prepparas*, 138 N. Y. 26, where one of the questions before the court was as to what was formerly the remedy for nonpayment of the quit rent reserved to the Crown. Mr. FOWLER criticises rather sharply the opinion of the court that the King might, by inquisition, have the estate of the tenant declared at an end, resume his possession, and his original seizin would be restored unaffected by the previous demise, and further distinguishing a fee farm grant from the Sovereign and one from a private person after the statute *Quia Emptores*. It is obvious that a consideration of this subject must be technical and intricate. It would be interesting to contrast the views of Mr. FOWLER and Justice MANYARD with those of the Supreme Court of Pennsylvania in *Ingersoll v. Sargeant*, 1 Whart. 337, in which the statute of *Quia Emptores* was declared never to have been in force in Pennsylvania. In the collection of authorities Mr. FOWLER

shows great fidelity and industry in research, and the work will undoubtedly be valuable to those who are required to investigate the early land law of New York. A work of this character indicates with startling clearness how close, after all, we are to the Middle Ages. W. H. L.

CASES ON CONSTITUTIONAL LAW, WITH NOTES. By JAMES BRADLEY THAYER, LL.D. In two volumes. Cambridge: Charles W. Sever. 1895.

The last parts of this work do not disappoint the expectation arising from the perusal of the first part, which was reviewed in 33 AM. LAW REG. & REV. 410. Part III deals with cases on the right of Eminent Domain and Taxation, and Part IV with *Ex post facto* laws, State laws impairing the obligation of contracts, the regulation of commerce, money, war, insurrection and military law. With Part IV is published a very good index of the entire work. It goes without saying that the cases are excellently selected, and that one who possesses this work of Prof. THAYER'S has, in a small compass, all the principal cases dealing with the Constitution of the United States, besides a collection of valuable notes, references and excerpts from the principal text books and historical documents. There is little, indeed, that is left to be desired, except that one would have wished the editor to have sometimes given his own views, at least so far as to call the reader's attention to the discrepancy, if any, or the real conflict between many of the reported decisions. Outside the law school, only those who are fond of Constitutional Law will possess this book or read the cases there referred to, and to them it would have been a matter of great interest to know what one, who has given the time and attention to the subject, thinks concerning the various doctrines of Constitutional Law laid down by the cases reported. For instance, in looking at Dartmouth College Case, we would not have objected to have the editor give his own opinion on the different points of Marshall's argument. Again, we would like to have heard what Prof. THAYER would have to say on the opinion in *Wheaton v. City*

of *Charlestown*, that a state tax on incomes from personal property, in so far as they fall on the income from United States bonds, is unconstitutional. The case, perhaps, did not seem of such vital importance when decided, and yet, to-day it has a special interest, not only because of its important bearing on the recent income tax decision, but from the fact that in other countries, such as Germany, where a state tax on the operations of the Federal government would be void, it has been decided that a general tax, which includes investments in the funds of the Federal government, is objectionable.

We must remember, however, that this collection of cases is primarily for the students of the Harvard Law School, and that the theory of the case system adopted by that school is to have the students read the original cases and think out the points involved for themselves, without too great reliance on the aid of text books or suggestive editorial notes. To any one who is doing any work on Constitutional Law, these cases will be invaluable, as they will enable him to carry around with him two-thirds of the material which he needs in a small and convenient compass.

W. D. L.

THE UNITED STATES INCOME TAX LAW SIMPLIFIED FOR BUSINESS MEN. 3d Ed. Enlarged and Revised. By FREDERICK A. WYMAN. 1895.

THE INCOME TAX LAW. Arranged with Annotations. By FRANCIS B. BRACKEN, assisted by EUSTACE GRIMES. Philadelphia: Kay & Bro. 1895.

The fact that the Income Tax Law no longer graces (?) the Statute Books of this country, is no reason why the very excellent, and had the law been allowed to stand, practical little books of Mr. FREDERICK A. WYMAN and of Messrs. FRANCIS B. BRACKEN and EUSTACE GRIMES should be regarded as valueless. Both these books, like the others upon the same subject, which have already been noticed in these pages, are exceedingly well done, and lawyers would do well to put them away on their shelves for a possible future use. Their

references are very complete and the variety of arrangement makes it difficult to decide which is the best.

It is interesting to note that Dr. PERSIFOR FRAZER's valuable work, "A Manual of the Study of Documents," is already recognized and cited as an authority by the courts. In a careful opinion in disposing of a rule for a new trial in *Vanderslice v. Snyder*, (Common Pleas of Luzerne County), RICE, J., quotes from Dr. FRAZER's work at length and adopts the author's conclusions as the basis of his decision. This is only another illustration of a fact well-known to those who have had the pleasure of practicing before him, that Judge RICE is always abreast of the times and is constantly adding to his unusually large store of legal knowledge. It will be remembered that the work referred to was reviewed in these pages when it first made its appearance.

We have read with much interest Mr. J. J. H. HAMILTON's pamphlet on "National Corporations," which is reprinted from the "University Law Review."

We have received the following communication from a subscriber :

Editor American Law Register and Review :

Can any of the readers of the REGISTER give me any information as to the whereabouts, within several years past, of William Cortland? He had large business interests in different cities of Pennsylvania, and in the oil fields, several years ago. Any such information will be important to his relatives.

CARL H. BECKHAM, Attorney,
Toledo, Ohio.

PENNSYLVANIA BAR ASSOCIATION.

The first annual meeting of the Pennsylvania Bar Association will be held at Bedford Springs, July 10th and 11th. It is expected that it will be an interesting and profitable occasion, and the indications point to a large attendance from all over the State. The association was organized by a convention held at Harrisburg last winter in response to a call signed by over 800 members of the Bar from every county in the State.

The meeting will be opened by an address from the President, Hon. John W. Simonton, of Dauphin. In addition to the regular and routine business, papers will be read as follows :

"The Mission of State Bar Associations," by J. Newton Fiero, Esq., of Albany, N.Y.; "Legal Education," by George Wharton Pepper; "The Local Bar Association: Its Functions and Relations to the State Bar Association," by Alex. Simpson, Jr.

The meetings will close with a banquet on the evening of the 11th, over which Hon. John W. Dalzell is expected to preside. The following toasts will be responded to: "The Commonwealth;" "The Client;" "The Lawyer and his Wife;" "The Bar;" "The Bench;" "The Legislature;" "Ourselves, the Bar Association;" "The American Bar Association."

The new association starts with a roll which includes the leading members of the Bar in almost every county, and which ranks it in point of membership second only to New York. The possibilities of usefulness of such association are large, both subjectively on the members themselves and objectively in the good which may be attained, both in raising the professional standard and guarding and directing what may be denominated as technical legislation. The measure of this usefulness will only be limited by the degree of sustained interest which it is possible to elicit from members of such an exacting profession as ours.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

JULY, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR JUNE.

Edited by ARDEMUS STEWART.

The Supreme Court of Louisiana, in *New Orleans City & L. R. Co. v. State Board of Arbitration*, 17 So. Rep. 418, has recently given a very full statement of the powers and duties of the state board of arbitration, established for the settlement of labor disputes, which is empowered to hold an investigation without the consent of all the parties, (1) On application of employers or employes, or of a duly authorized agent of the latter; or (2) On notification from the mayor or a district judge in the parishes that a lock-out or strike is seriously threatened. The summary of these powers and duties is as follows:

Arbitration.
State Board,
Labor
Disputes

(1) The board is not vested with judicial functions. It sits as a court of conciliation, with the authority to formulate a decision, and to have it recorded:

(2) In the first instance, it is the duty of the board to pass upon questions of regularity and compliance with the statute, or the contrary, in the steps taken to bring labor troubles to its notice:

(3) It is authorized to hear the parties, make inquiry the causes of trouble, advise the parties, and keep a record its decision regarding the cause of dispute:

(4) It is not bound in all things to decide according to technical rules of law that would possibly determine issues in a court of justice, but it is subject to the terms of the statute under which it was organized, and is bound to observe those broad rules of law and equity without which no board of arbitration and conciliation can make a just decision :

(5) Objections upon the grounds of irregularity must be urged before the board, and heard contradictorily with the parties concerned, or their duly authorized representatives, prior to application to the court to correct alleged errors :

(6) An apprehension that the conclusion and decision of the board will be erroneous is no ground for an injunction ; for an injunction will not issue to control the action of public agents, acting under legislative authority, unless irreparable injury is evident.

The Court of Appeals of New York has lately held, affirming 32 N. Y. Suppl. 498, that under the rules of the New

Banks,
Clearing-
house
Rule,
Insolvent
Banks

York clearing-house, which provide that arrangements by a member of the association to clear for an outside bank shall not be discontinued without previous notice, and that the notice shall not take effect until the completion of clearances on the day after the receipt of the notice, a contract by which a member agrees with a bank that is not a member to clear for it, in consideration of a deposit of a certain sum of money and bills receivable, is valid, and requires the member to pay checks on the other bank presented to the clearing-house on the day after notice of discontinuance is given, though it knew at the time that the other bank was insolvent ; and that such payments are therefore not within the prohibition of the New York statute, (Laws 1892, c. 68, § 48,) forbidding payments by an insolvent corporation made with intent to prefer creditors, and the money and securities held under the aforesaid contract are applicable to the amount of the checks so paid : *O'Brien v. Grant*, 40 N. E. Rep. 871. ANDREWS, C. J., and PECKHAM, J., dissented.

Building Associations, Insolvency, Assessment

An insolvent building association has the right to make an assessment on a borrowing member's stock, for the purpose of covering losses, and thereby equalizing the members, so that at the closing of the affairs of the association all may go out on an equal footing: *Wohlford v. Citizens' Building, Loan & Savings Assn.*, (Supreme Court of Indiana,) 40 N. E. Rep. 694.

Building Contract, Construction, Alteration of Plans

According to a recent decision of the Supreme Court of Pennsylvania, the provision of a building contract for the forfeiture of \$10 a day for each day the building remains unfinished after the day fixed for its completion, does not apply to delay caused by changes in the material ordered by the owners, though the contract should provide that any change in the plans, "either in quantity or quality of the work," shall be executed by the contractor, "without holding the contract as violated or void in any other respect:" *Lilly v. Person*, 32 Atl. Rep. 23.

Carriers, Assault on Trespasser by Servant

In the opinion of the Supreme Court of Mississippi, a sleeping car company is not liable for an assault made by one of its stewards on a passenger on one of the regular cars of the train, who has without right entered the defendant's car attached to the train, in order to induce the steward to sell him liquor, in violation of the law, and of the orders of the company: *Cassedy v. Pullman Palace-Car Co.*, 17 So. Rep. 373.

Licenses, Person Assisting Another on Train

The Court of Civil Appeals of Texas has recently held, in accord with the weight of authority, that a person who boards a train merely to assist another to a seat must give notice of his intention to get off again, in order to hold the company liable for not having given him time to do so; especially when the train had stopped the usual and a reasonable time for passengers to get on and off, and he jumped off of his own volition after it had started: *Dillingham v. Pierce*, 31 S. W. Rep. 203.

One who boards a train in order to assist another thereon, without giving the employees of the company any notice of

his intention to alight, cannot recover, if, after the train has started, he attempts to get off without requesting that the train be stopped, and is injured while so doing: *Central R. R. & Banking Co. of Georgia v. Letcher*, 69 Ala. 106. See 2 AM. L. REG. & REV. (N. S.) 151.

In *Griswold v. Chic. & N. W. Ry. Co.*, 64 Wis. 652; S. C., 26 N. W. Rep. 101, a person not a passenger got upon a railroad train at a station in order to assist his wife, who was a passenger, to alight therefrom. She had already left the train; and while he was standing on the platform of a car, the train suddenly started, and he was thrown off and injured. Before it started, however, all passengers for that station had got off, those waiting to take the train had got on, and the mail, express matter and baggage had been put off. None of the employes of the company knew that he expected to go on the train, or that he had done so; and a brakeman knew that his wife had got off the train, and needed no assistance. Upon these facts, it was held that he could not recover.

When the plaintiff, who was injured by the negligence of a servant of the company, was at the time of the injury on a trip, by special invitation, in the officers' car, and was not called upon to pay his fare, the fact that he held an annual free pass over the road does not relieve the company from liability. It will not be assumed, from the fact that he had a free pass, that he was using it on the occasion in question, in the face of a special request to ride in the officers' car, where fare is not charged: *Thompson v. Yazoo & M. V. R. Co.*, (Supreme Court of Louisiana,) 17 So. Rep. 503.

In *Great Northern Railway Co. v. Palmer*, [1895] 1 Q. B. 862, a very interesting case recently decided by the Queen's Bench Division, the defendant, a passenger on the plaintiff's railway, took a special excursion ticket entitling her to travel from Peterborough to Woodhall Spa, at a fare considerably lower than the ordinary fare. The ticket contained a condition that if used for any other station it would be forfeited and the full fare charged. The defendant traveled to and returned from

Injury to
Passenger.
Free Pass

Passenger.
Conditions of
Limited
Ticket

Horncastle, a station beyond Woodhall Spa, paying the ordinary fare for the journeys between Woodhall Spa and Horncastle. The total amount paid by the defendant was much less than the ordinary return fare between Peterborough and Horncastle. Upon these facts the court held that the condition as to forfeiture was applicable to stations beyond that named on the ticket as well as to intermediate stations; and that as the defendant had used the ticket for a journey to a station other than that named on it, and not merely for a journey to the station for which it was available, the plaintiffs were therefore entitled to treat the ticket as forfeited, and to recover the full fare.

The Supreme Court of Illinois has recently held, in *Pope v. Hanks*, 40 N. E. Rep. 839, that, since notes given in settlement of gambling transactions are void, even in the hands of innocent indorsees for value before maturity, by the express language of Rev. Stat. Ill. 1893, c. 38, §§ 131 & 136, such notes will not be enforced, although made and indorsed in another state, by the laws of which such notes, though invalid as between the original parties, are good in the hands of innocent indorsees.

Contract,
Gambling,
Innocent
Holder,
Conflict
of Laws

A contract between a purchaser of "futures" and a broker, made without the state, during the existence of a statute making it unlawful to deal in futures "in this state," cannot be enforced in the state, though valid where made: *Lemonius v. Mayer*, 71 Miss. 514; S. C., 14 So. Rep. 33; *White v. Eason*, (Miss.) 15 So. Rep. 66.

The Privy Council of England, in *Forget v. Ostigny*, [1895] A. C. 318, has adopted the sound rule, that when a broker is employed to make purchases and sales of stock for a principal whose object is not investment but speculation, and these purchases and sales are actually completed by delivery to the holder, who obtains the money necessary to pay the advances required by hypothecating the stock, the transactions are not gambling contracts; for delivery to the broker is delivery to the principal.

Gambling
Contract,
Delivery

There is an annotation on this subject, in 1 AM. L. REG. & REV. (N. S.) 436.

An association of fire underwriters, formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents, and nonintercourse with companies not members, is not an illegal conspiracy, and the accomplishment of its purposes by lawful means will not be enjoined at the suit of a company not a member of the association: *Continental Ins. Co. v. Board of Fire Underwriters of the Pacific*, (Circuit Court, Northern Dist. of California,) 67 Fed. Rep. 310.

According to a recent opinion of Judge WALES, of the Court of Oyer and Terminer of New Jersey, in the case of *State v. Harrigan*, 31 Atl. Rep. 1052, the use of intoxicating liquors by members of the jury, during a trial for capital felony, unless so excessive as to disqualify them for the intelligent performance of their duty, is no ground for a new trial; though it is irregular, and both the person who furnishes it, and the jurors who drink it, are deserving of censure, and may be punished for so acting without the permission of the court.

Criminal Law,
New Trial,
Use of Liquor
by Jury

The old rule was that any indulgence in intoxicating liquors by the jury, during the progress of either a civil or criminal trial, was ground for setting aside the verdict, although the quantity taken was not enough to affect them in the least: *Pro. v. Douglass*, 4 Cow. (N. Y.) 26; *Brant v. Fowler*, 7 Cow. (N. Y.) 562; *Gregg v. McDaniel*, 4 Harr. (Del.) 367; but the New York cases cited were overruled by *Wilson v. Abrahams*, 1 Hill, 207, and the general rule now is, that indulgence in liquor by any of the jury, during a trial, whether criminal or civil, will not vitiate the verdict, unless it had an apparent effect upon those who partook of it, or was such as to create a presumption that they were affected by it: *Pro. v. Sansome*, 98 Cal. 235; S. C., 33 Pac. Rep. 202; *Pro. v. Benamerly*, 98 Cal. 299; S. C., 33 Pac. Rep. 263; *Commonwealth v. Cleary*,

48 Pa. 26; *Howe v. State*, 11 Humph. (Tenn.) 491; *King v. State*, 91 Tenn. 617; S. C., 20 S. W. Rep. 169; *Sanitary District of Chicago v. Cullerton*, 147 Ill. 385; S. C., 35 N. E. Rep. 723; especially if administered by a physician to a sick juror: *Pro. v. Pscherhofer*, 64 Hun. (N. Y.) 483.

It has been held, however, that when the jury has drunk intoxicating liquor during the trial, it raises a presumption against the validity of the verdict, which may be rebutted by showing that in fact the jurors were not intoxicated: *State v. Madigan*, (Minn.) 59 N. W. Rep. 490; and in any case, the drinking of liquor during a trial is a gross impropriety, for which the juror, and the officer permitting it, may and should be punished: *Sanitary District of Chicago v. Cullerton*, 147 Ill. 385; S. C., 35 N. E. Rep. 723. If liquor is drunk at all, it should only be under the direction of the court: *State v. Reed*, (Idaho.) 35 Pac. Rep. 706; and the better course is for the trial judge to forbid the use of liquor in the jury room, unless by permission of the court, and for cause shown: *Commonwealth v. Cleary*, 148 Pa. 26. A violation of such an order will of course vitiate the verdict.

When the jury are allowed to separate at each day's adjournment, and a juror has been drunk one evening, but is not obviously drunk when he appears in his place the next day, there being other circumstances favoring the defendant, a new trial should be granted: *Brown v. State*, (Ind.) 36 N. E. Rep. 1108; and when the drinking of liquor by a juror is attended with improper conduct, as when he separates from his fellows to drink in a bar-room, or when liquor is conveyed to him by one who is interested in the result of the trial, a new trial should be granted: *Commonwealth v. Salyards*, 13 Pa. C. C. 470; and of course if he is obviously intoxicated, the verdict will be set aside.

The Supreme Court of New Jersey has recently decided, that an act which provides that if a prisoner shall plead guilty to an indictment for murder, that plea shall be disregarded, a plea of not guilty be substituted, and the case be tried by a jury, is constitutional, since such a provision is favorable to the accused, and does not

Pleading,
Constitutional
Law

deprive him of any indefeasible right : *Gray v. State*, 31 Atl. Rep. 1037.

The Court of Appeals of New York, in *In re Buchanan*, 40 N. E. Rep. 883, has asserted some very salutary principles of criminal law, which the counsel for the criminal attempted to obscure, but ineffectually. These were (1) That as no appeal lies to the federal supreme court from an order of a federal district judge, made at chambers, denying a writ of *habeas corpus*, the taking of such an appeal does not act as a *supersedeas*, so as to prevent, until the determination of the appeal, the execution of the death sentence imposed by a state court on the appellant ; and (2) That when a reprieve is granted in a capital case to a day certain, the warden should execute the sentence on the day the reprieve expires, and the time of execution need not be again fixed by the court.

When the execution of the sentence of a convict is respited by the governor, for the purpose of having the conviction reviewed by an appellate court, it is the duty of the sheriff to execute the sentence of the court on the day to which the execution is respited, unless the judgment be reversed or annulled, or a further respite be granted ; and it is not necessary in such a case that the convict be previously brought into court by *habeas corpus* : *Pro. v. Enoch*, 13 Wend. 159. And a warrant from the governor to the sheriff, to suspend the execution of a prisoner until a day specified, and commanding him on that day, between the hours named, to execute the sentence, is a proper form of reprieve, and authorizes the sheriff, on the day named, to execute the prisoner, without the further order of the court : *Sterling v. Drake*, 29 Ohio St. 457.

According to the Supreme Court of Pennsylvania, the erection of a roofed porch, built on brick foundations, and permanently attached to the whole front width of a house, is a violation of a building restriction in a deed that all buildings shall be erected not less than a certain number of feet back from the fence line : *Ogonts Land & Improvement Co. v. Johnson*, 31 Atl. Rep.

Unauthorized
Appeal,
Effect of
Reprieve

Deed,
Building
Restrictions

1008. And in the opinion of the Supreme Judicial Court of Massachusetts, a similar restriction is violated by the erection, within the prohibited distance, of a piazza, eight feet wide, encircled by a railing, and having a roof supported by posts, attached to a house, and extending along its entire front : *Rardon v. Murphy*, 40 N. E. Rep. 854.

The Vice-Chancellor for Ireland has decided, in the recent case of *Porter v. Walsh*, [1895] 1 Ir. R. 284, that an unindorsed deposit receipt is a good subject-matter of a *donatio mortis causa*.

The Supreme Court of Georgia has lately ruled, that when one has for less than the statutory period of prescription used as a private way a strip of land belonging to another, and then, at the request of the owner, abandoned this strip, and with the consent of the owner used another strip belonging to the latter, in its stead, as a private way, also for less than the statutory period, the two users cannot be tacked together so as to create a prescriptive right of way in either strip, though together the period of use amounts to more than the statutory period : *Peters v. Little*, 22 S. E. Rep. 44.

The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Connolly*, 40 N. E. Rep. 862, has recently laid down the principles of law governing a prosecution for falsely making or signing a certificate of nomination or nomination paper, as follows: (1) That it is sufficient to charge the offences in the language of the statute, as they were unknown at common law; (2) That a provision that any voter who signs a nomination paper shall do so in person, requires the voter to sign with his own hand, or to be present at the signing by another for him, and request it to be done; and (3) That it is no defence to a prosecution for signing a certificate of nomination in another's name, that the defendant entertained no criminal intent, and thought that he had a right to do so.

Elections,
Criminal Law.
Signing
Nomination
Paper

Easement,
Prescriptive,
Tacking

Donatio
Mortis Causa

The Supreme Court of Missouri, (Division No. 1,) has recently held, that under a statute (Acts Mo. 1893, § 4781.)

Preparation
of Ballot

which provides that "on receipt of his ballot, the elector shall, forthwith, and without leaving the polling place, retire alone to one of the places, booths, or compartments provided, to prepare the ballot," the fact that several voters neglected to retire to the booths to mark their ballots will not make their votes illegal, when it does not appear that such neglect was wilful: *Hall v. Schoenecke*, 31 S.W. Rep. 97.

The Court of Appeals of New York, in *In re Goodman*, 40 N. E. Rep. 769, has affirmed the decision of the court below,

Voters,
Students

reported in 31 N. Y. Suppl. 1043, that, under the Constitution of New York, Art. 2, § 3, which provides that, for purposes of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while a student of any seminary of learning, he does not, by rooming in a seminary while a student, gain a right to vote in the election district in which it is situate. It modifies the general language of that decision, however, by adding that there may be circumstances under which a student may gain a residence in the district where the seminary is situate; but that the acquisition of such a residence must be not only intended, but accomplished, wholly apart from his position as a student. See 2 AM. L. REG. & REV. (N. S.) 220, 281.

Equity cannot, on the ground of preventing a multiplicity of suits, entertain jurisdiction of a bill by the receiver of a national

Equity,
Pleading,
Multifarious-
ness

bank against its stockholders to recover dividends illegally paid them out of its capital stock, as such a bill is multifarious, one stockholder having no interest in the claim against another: *Hayden v. Thompson*, (Circuit Court, Dist. of Nebraska,) 67 Fed. Rep. 273.

A conviction for obtaining property under false pretences cannot be had on the extrajudicial statements and admissions of the defendant alone as to the falsity of the statements, since that falsity is part of the *corpus delicti*, which must be proved otherwise: *Pro. v. Simonson*, (Supreme Court of California,) 40 Pac. Rep. 440.

False
Pretences,
Confession

In *Capehart v. Foster*, 63 N. W. Rep. 257, the Supreme Court of Minnesota has decided some interesting questions on the subject of fixtures, holding that, as between mortgagor and mortgagee, (1) Gas fixtures, consisting of chandeliers and burners, screwed to the ends of the gas pipes projecting from the walls and ceilings of the building, are not a part of the realty; (2) That the foregoing is to be regarded as an arbitrary exception to the general rule regarding fixtures, and does not apply to steam radiators, attached at the floors to steam pipes by being screwed to them, and such radiators are to be considered as a part of the realty; (3). That an electric annunciator, attached to the wall and to all the wires of the electric bell system of a hotel, is a part of the realty; and (4) That an office desk, about twenty-five feet long, resting on a tile floor, between projections in the walls, to which it was fastened by screws, and forming, with the space behind it, the hotel office, is a part of the realty.

As between the holder of a real estate mortgage and a chattel mortgagee, carpets, curtain rods and gas fixtures, and their attachments, are movables; but as to whether ranges, hot water boilers, sinks and washtubs are movables, depends on when and how they were attached to the house: *Manning v. Ogden*, 24 N. Y. Suppl. 70.

When land was leased for the use of operating an electric lighting plant, and the lessee built on a solid stone foundation, laid with mortar, a substantial dynamo house, in which he placed two dynamos; and also built a boiler house of rough lumber upon sills laid on stone or blocks, with a shaft house or shed, constructed for the most part of old lumber from buildings on the premises, and a shafting twenty-nine feet long, resting on trestles imbedded in the ground to the depth of two feet, it was held that the buildings, as well as the machinery, were accessory to the trade, and therefore were removable as trade fixtures by the lessee, on the termination of the lease: *Brown v. Reno Electric Light & Power Co.*, 55 Fed. Rep. 229.

In *National Bank of Catasauqua v. North*, 160 Pa. 303; S. C., 28 Atl. Rep. 694, it was held that radiators and valves connected with steam heating apparatus were not fixtures

attached to the realty, but were exactly analogous to gas fixtures, and therefore severable from the real estate.

As between mortgagor and mortgagee, a "bar," fastened by nails and screws to the wall and floor of a building used by the mortgagor as a saloon, is a part of the realty, and passes by the mortgagee: *Woodham v. First National Bank of Crookston*, 48 Minn. 67; S. C., 50 N. W. Rep. 1015.

The Supreme Court of Minnesota has lately ruled, in *Sterry v. Eastern Ry. Co. of Minnesota*, 63 N. W. Rep. 256, that property in the hands of a common carrier, in transit to a place outside of the state, is not subject to garnishment, although it is yet within the state at the time of the service of the garnishee summons.

According to a recent decision of the Common Pleas of New York City and County, at special term, a provision in an insurance policy, that no action shall be brought on it by the insured, except against the attorneys in fact representing all of the insurers, is against public policy, on the ground that it ousts the jurisdiction of the courts: *Norr v. Bates*, 33 N. Y. Suppl. 691.

The Supreme Court of the United States, in refusing the petition for a writ of *habeas corpus* in *In re Debs*, 15 Sup. Ct. Rep. 900, went further than the circuit court, and based its decision on exceedingly broad principles, which will make it a landmark in the legal history of this country. These, as laid down in the opinion of Mr. Justice BREWER, are as follows:

(1) The government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; and, while it is a government of enumerated powers, it has within the limits of these powers all the attributes of sovereignty:

(2) To it is committed power over interstate commerce, and the transmission of the mail; and the powers thus conferred are not dormant, but have been assumed and put into practical exercise by the legislation of Congress. In the exercise of

these powers, it is competent for the nation (through its officers) to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce, or the carrying of the mail:

(3) While it may be competent for the government, (through the executive branch, and in the use of the entire executive power of the nation,) to forcibly remove all such obstructions, it is equally within its power to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur; to invoke the powers of these courts to remove or restrain such obstructions:

(4) The jurisdiction of the courts to interfere in such matters by injunction is one recognized from ancient times, and by indubitable authority; and is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law:

(5) The proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt, which are not an execution of the criminal laws of the land; and therefore the penalty for a violation of an injunction is no substitute for, and no defence to, a prosecution for any criminal offence committed in the course of such violation:

(6) That as the complaint in this case clearly showed an existing obstruction of artificial highways for the passage of interstate commerce and the transmission of the mail, not only temporarily existing, but threatening to continue, the circuit court had power to issue its process of injunction; that having issued, and having been served on the defendants, the circuit court had authority to inquire whether its orders had been disobeyed; when it found that they had been, then to proceed under Rev. Stat. U. S. § 725, and enter the order of punishment complained of; and, the circuit court having full jurisdiction in the premises, its finding of the fact of disobedience is not open to review on *habeas corpus* in the supreme or any other court.

The Supreme Court of Missouri, (Division No. 2,) has

recently decided, that under § 7211 of the Revised Statutes of that state, which declares that any person who Peddler,
License Tax deals in goods by going from place to place to sell the same is a peddler, one who, as agent of an establishment located in another state, takes one of the harrows which it has shipped to an agent in the state, and goes through the country with it, sometimes selling the single harrow outright, at other times taking a written order and then delivering the one with him, and at other times taking a written order and then going back for one to the agent to whom they had been shipped, is a peddler; and, because of the nature of his business, a license tax may be lawfully imposed upon him, without interfering with interstate commerce: *State v. Snoddy*, 31 S. W. Rep. 36.

The Supreme Court of Pennsylvania, in *Commonwealth v. Heckler*, 32 Atl. Rep. 52, has recently decided, reversing 14 Pa. C. C. 465, that one who, while driving about the neighborhood on Sunday to induce all the electors to vote at a coming election, carried a flask of liquor for his personal comfort, out of which he gave drinks to those on whom he called, without charge, and solely to cause good feeling, was not guilty of furnishing liquor on Sunday, within the act of May 13, 1887, P. L. 108, § 17, which prohibits the furnishing of intoxicating liquors on that day, by sale, gift, or otherwise.

Intoxicating
Liquors,
Sunday,
Gift An act restraining and regulating the sale of intoxicating liquors, which prohibits the furnishing of such liquors on Sunday, by "sale, gift, or otherwise," does not prohibit the use of liquors by a private citizen on his own table on Sunday, or make it a misdemeanor to furnish them to his family or his guests in his own house; the furnishing that is made punishable is a furnishing in evasion of the law: *Commonwealth v. Carey*, 151 Pa. 368; S. C., 25 Atl. Rep. 140, 31 W. N. C. 116.

When a prohibitory liquor law excepts from its provisions persons who give liquor to "their invited guests at their own household," one whom another has invited to his house for

the purpose of giving him a drink is to be regarded as an "invited guest," within the meaning of the statute: *Powers v. Commonwealth*, 90 Ky. 167.

But when a statute prohibits the sale or gift of intoxicating liquors on election day, it is immaterial that the gift of the liquor has no reference to the election, as the statute makes no exception: *Wolf v. State*, (Ark.) 27 S. W. Rep. 77; *Commonwealth v. Murphy*, 95 Ky. 38; S. C., 23 S. W. Rep. 655. This seems questionable, however; and it is hardly likely that a man would be convicted of giving a drink to a friend, in his own house, on election day.

In *Skerras v. De Rutzen*, [1895] 1 Q. B. 918, the Queen's Bench Division has recently held, that a statute (35 & 36 Vict. c. 94, § 16, sub-s. 2,) which provides that if any licensed person "supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable," he shall be liable to a penalty, does not apply when the licensed person *bona fide* believes that the constable is off duty; but that guilty knowledge is an essential element of the offence. In this case the constable had removed his armlet, which he was required to wear while on duty, before going into the house; and WRIGHT, J., in his opinion, very tersely says: "It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction, . . . since it would be as easy for the constable to deny that he was on duty, when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house."

The same judge also defines very clearly the three classes of cases in which the *mens rea* is not requisite, as (1) Those acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty; (2) Some, and perhaps all, public nuisances; and (3) Cases in which, although the proceeding may be criminal in form, it is really only a summary mode of enforcing a civil right. The learned gentlemen who would hold a liquor-seller liable in all

Violation of
Statute,
Scienter

cases for selling to a minor, in spite of any facts which would have led an ordinary man to believe him of full age, are respectfully referred to a careful perusal of this case.

A receiver of an insolvent corporation, who takes possession of a leasehold estate held by the corporation, does not thereby become an assignee of the term, nor liable on the covenants of the lease, but is liable only for a reasonable rent while in possession: *Bell v. American Protective League*, (Supreme Judicial Court of Massachusetts,) 40 N. E. Rep. 857.

The House of Lords, in *White v. Mellin*, [1895] A. C. 154, has held, reversing the decision of the Court of Appeal, [1894] 3 Ch. 276, 2 AM. L. REG. & REV. (N. S.) 21, that since an action will not lie for a false statement in disparagement of a trader's goods without proof of special damage, the fact that the defendant sold the plaintiff's "Infant Food," affixing to the wrappers thereon a label stating that the defendant's food was far more nutritious and healthful than any other, in the absence of proof that the statement was untrue, or that it had caused any damage to the plaintiff, would not authorize an action, or be sufficient ground for the issuing of an injunction to restrain the defendant.

In determining the question of libel, the headlines of a publication are important, and cannot be disregarded, for they often render a publication libelous on its face, which without them might not necessarily be so: *London v. Watkins*, (Supreme Court of Minnesota,) 63 N. W. Rep. 615.

According to a recent decision of the Court of Appeal of England, when the magistrates of a borough, for the purpose of facilitating the business of the general annual licensing meeting, ordered the defendant, who was head constable of the borough, to issue to persons having business before the meeting copies of a report made by him to the magistrates, stating the grounds of objection taken to the renewal of licenses, the publication of the report by the defendant, in pursuance of the order of the magistrates,

was made upon a privileged occasion, and therefore, in the absence of actual malice on his part, an action could not be maintained against him in respect of grounds of objection so published, which the plaintiffs alleged to be a libel upon them: *Andrews v. Bauer*, [1895] 1 Q. B. 888.

When the defendant, in instituting the prosecution complained of, went before a magistrate with his counsel, to make a complaint, expecting to make the complaint in writing, and that the warrant would be issued in the usual manner, he is not liable for the act of the magistrate in directing the arrest of the defendant without a warrant: *Foupard v. Dumas*, (Supreme Court of Michigan.) 63 N. W. Rep. 301.

When a person institutes a criminal prosecution, knowing that the facts did not authorize such action, there is no probable cause for the prosecution; and the finding of an indictment, or the fact that a justice of the peace required the plaintiff to enter into an undertaking to abide the order of the district court, is not conclusive proof of probable cause: *Flackler v. Novak*, (Supreme Court of Iowa,) 63 N. W. Rep. 348.

Under a statute, (Comp. Stat. Mont., Div. 5, § 1391.) which provides that "all persons furnishing things or doing work shall be considered sub-contractors," a sub-contractor in the third degree is entitled to file a mechanics' lien: *Duignan v. Montana Club*, (Supreme Court of Montana,) 40 Pac. Rep. 294.

According to the Supreme Court of Pennsylvania, the issue of certificates by a clearing-house association, in return for cash or securities deposited in the hands of a committee by the members of the association, which certificates are receivable in payment of daily balances, is no violation of the laws relating to national banks: *Philler v. Patterson*, 32 Atl. Rep. 26.

The Supreme Court of Appeals of West Virginia, in *Town of Davis v. Davis*, 21 S. E. Rep. 906, has recently held, that a merry-go-round, run by a steam engine, the whistle of which blew every few minutes, accompanied by a band, and attended by a large, noisy and boisterous crowd until after ten o'clock at night, disturbing some of the people who lived near it, was a nuisance, and after proper investigation, could be abated by the town council, under a statute, (Code W. Va., c. 47, § 28,) giving a town council power to abate, or cause to be abated, anything which in the opinion of a majority of the whole council shall be a nuisance. See 1 AM. L. REG. & REV. (N. S.) 872.

Under the Constitution of New York, Art. 13, § 5, providing that no public officer shall receive a free pass from any corporation, a railroad policeman, appointed under the laws of that state, and employed by the defendant corporation to prevent depredations upon its property, is not prohibited from receiving a pass from the defendant, when the pass is part of the compensation the plaintiff was to receive for rendering services to the defendant, and therefore was not gratuitous: *Dempsey v. New York Cent. & H. R. R. Co.*, (Court of Appeals of New York,) 40 N. E. Rep. 867. See 2 AM. L. REG. & REV. (N. S.) 230, 372.

According to a recent decision of the Supreme Court of California, an officer cannot be removed from office, during his second term, for a violation of duty committed during his first term, in the absence of express statutory provisions: *Thruston v. Clark*, 40 Pac. Rep. 435.

Under the provisions of the Constitution of Louisiana, however, which provides in Art. 196 that all state officers shall be liable to impeachment for certain enumerated causes, and in Art. 201 that district attorneys, clerks of court, sheriffs, &c., &c., shall be removed by judgment of the district court of the domicile of such officer, for any of the causes enumerated in Art. 196, that the proceeding for removal is akin to that of impeachment; and since impeachment will lie against an

officer for acts done in a preceding term, the acts denounced by Art. 196, done in a prior term of office, by an officer who is his own successor, will form the foundation of a suit for removal, under Art. 201: *State v. Bourgeois*, 45 La. Ann. 1350; S. C. 14 So. Rep. 28.

An officer cannot be removed for misconduct in another office which he held prior to his induction into the office from which it is sought to remove him: *Speed v. Common Council of City of Detroit*, 98 Mich. 360; S. C., 57 N. W. Rep. 406.

The Supreme Court of Pennsylvania has lately held, in *Wilcox v. Derickson*, 31 Atl. Rep. 1080, that a stipulation that

Partnership,
Articles of Association,
Liability of
Estate of Deceased
Partner

the death of a partner shall not operate as a dissolution of the association, but that the decedent's shares shall thereupon vest in his executors, or administrators, or devisees of the stock, who shall succeed as in case of transfer on the books, (in which case the assignee of stock is made subject to the rights and obligations of the original owner thereof,) does not compel an executor of the deceased partner to accept the stock which belonged to his testators, so as to charge the decedent's general estate with firm debts contracted after his death.

According to a recent decision of the Supreme Court of Missouri, (Division No. 2,) a city ordinance requiring every

Pawnbrokers,
Regulation,
City Ordinance

pawnbroker to keep a book, in which shall be entered a description of all property left with him in pawn, together with the name and description of the person by whom it was left, and to submit such book to the inspection of the mayor or any police officer, on demand, is a mere police regulation to aid in the detection and prevention of larceny, which a city has a right to pass, under a charter giving it power to license, regulate, tax, or suppress pawnbrokers; and such an ordinance is not unconstitutional, either (1) as being in conflict with the Fifth Amendment to the Constitution of the United States, providing that no person shall be compelled to be a witness against himself in any

criminal case, or (2) as being in conflict with Art. 2, § 18, of the Constitution of Missouri, providing that the people shall be secure in their persons, papers, houses and effects, from unreasonable searches and seizures: *City of St. Joseph v. Levin*, 31 S. W. Rep. 101.

The Queen's Bench Division of England, in *The Queen v. Baker*, [1895] 1 Q. B. 797, has lately held, that all false

Perjury statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect thereof; and that therefore a defendant, charged with selling beer without a license, who falsely swears that, when previously charged with a similar offence, he had not authorized a plea of guilty to be put in, and that such a plea had been put in without his knowledge and against his will, is guilty of perjury, since such statements were material, as affecting the defendant's credit as a witness.

According to a recent decision of the House of Lords, when a principal entrusts an agent with securities, and instructs

Principal and Agent. Excess of Authority. Liability of Principal him to raise a certain sum upon them, but the agent borrows a larger sum upon them and fraudulently appropriates the difference, the principal cannot redeem the securities without paying the lender all he has lent, if the latter acted *bona fide* and in ignorance of the limitation, although the agent obtained the loan by fraud and forgery, and the lender did not know that the agent had authority to borrow at all, and made no inquiry: *Bracklesby v. Temperance Permanent Bldg. Soc.*, [1895] A. C. 173; affirming [1893] 3 Ch. 130.

A contract to act as county printer for the year, made with the county commissioners, at their regular meeting in January, is valid, in spite of the fact that a majority of the board, as it then existed, was to go out of office the week after: *Liggett v. Board of Comrs. of Kiowa Co.*, (Court of Appeals of Colorado,) 40 Pac. Rep. 475.

Public Contract. Validity

Unless there is some special statutory requirement, a city council or other contracting body cannot arbitrarily refuse to entertain a bid for public printing, because the bidder is not at that time the owner of a newspaper: *Berry v. City of Tacoma*, (Supreme Court of Washington,) 40 Pac. Rep. 414.

School laws are not rendered special or local, or otherwise unconstitutional, by the fact that under their operation a higher grade of education may be afforded to the children in one district than that provided for those in another: *Landis v. Ashworth*, (Supreme Court of New Jersey,) 31 Atl. Rep. 1017.

In the opinion of the same court, the power to purchase land and erect a school-house includes also the power to fence and grade the lot, to supply the school property with drinking water, and to equip the school-house with proper school furniture: *State v. Board of Education of Cranbury*, 31 Atl. Rep. 1033.

When by statute, a sheriff is allowed his actual traveling expenses, in addition to his fees, the county is liable for railroad fare which he has paid, since they are part of the actual expenses necessarily incurred, even though he has a railroad pass, which he does not use: *Sargent v. Board of Comrs. of La Plata Co.*, (Supreme Court of Colorado,) 40 Pac. Rep. 366.

The Supreme Court of North Carolina has recently decided, over the strong dissent of AVERY and CLARK, JJ., that when an enrolled bill has been duly signed by the President of the Senate and Speaker of the House, a court cannot go behind this record, and inquire whether, in the passage of the bill, it was fraudulently enrolled before it had been read before each house the number of times required by the constitution, though that fact is apparent on the face of the journal of proceedings kept by each house in accordance with the requirements of the constitution: *Carr v. Cole*, 22 S. E. Rep. 16. The real effect of this decision

will be better understood from the fact that it appeared from the journal that the only bill similar to the one signed by the presiding officers had been introduced in the House of Representatives, passed first reading, was tabled on second reading, and was still to be found among the files of documents. No such bill had ever been introduced in the Senate. It would be difficult to conceive of a more flagrant abuse of legal principles.

MONTGOMERY, J., in his concurring opinion, stated the bearings of the question at issue very clearly, but unfortunately erred in his solution of it. It, he said, brought to light "the more than possibilities of two most serious menaces to popular government: The first one, that of the power of a corruptible or incompetent clerical force, or that of a depraved and hired set of lobbyists, or both together, to tamper with the acts and proceedings of the legislature, and have that certified to be law which never was in fact enacted; the second, that of the power of defeated and unscrupulous politicians, when stung by loss of office or a desire for revenge on their political enemies, to practically repeal the legislation of their successful opponents by resorts to the courts upon mere allegations that there was fraud in the passage of the acts or in their ratification, and by procuring injunctions upon affidavits obtained possibly through bribery, or through the ignorance or carelessness of the oath maker. By the decision of the court, the latter danger—the far most to be dreaded—is avoided. The presiding officers of the two houses may, by taking a sufficiency of time, and by close scrutiny and rigid examination of the bills and wrappers, prevent fraud and error in ratification, if such a thing be attempted; while for the latter danger no limit or restraint can be found, except in the conscience of men who have never cultivated a sense of either generosity or justice."

With all due deference, the latter contingency is *not* the most to be dreaded. By a lawsuit, no matter how baseless or vexatious, no matter how corruptly carried on, the truth stands a chance of being brought to light; but according to the ruling in this case, it can never be. The only remedy the

people have against a statute foisted upon them as this was, is to repeal it at the next session; and meanwhile suffer all its evil consequences. The repeal, too, might be prevented by the very means that secured the passage of the bill in the first place. The position of the learned judge is therefore utterly fallacious; and it is a pleasure to be able to contrast with his dogmatic inanities the vigorous language of the dissenting opinion of CLARK, J., which effectually disposes of the fancied inviolability of the certification of the bill by the presiding officers of the legislature. "The signing," he says, "has no law-making power in itself, but is a mere certification of what the law-making body has decided, and, like all certificates, may be impeached for fraud or mistake; otherwise the certificate is more powerful than the authority doing the act which is certified. If we could conceive that the two presiding officers of any legislature should purposely certify that a bill has passed which had in fact been defeated, this could not nullify the action of the two houses. If it could, then they, and not the general assembly, are the law-making power. Certainly, for a stronger reason, when the signatures of the presiding officers are procured by a trick and fraud practiced on them, there cannot be such virtue therein, as to make a law against the vote of the body."

This, however, did not prevent the court from adhering to its former decision when the question was raised before it a second time; and in *Wyatt v. Wheeler & Wilson Mfg. Co.*, (N. C.) 22 S. E. Rep. 120, it simply affirmed the decision in *Carr v. Coke*, with the same difference of opinion as in that case.

The Supreme Court of Texas has recently held, overruling the decision of the Court of Civil Appeals, in 31 S. W. Rep.

Statute of
Frauds.
Guarantee of
Minor's
Contracts

216, that since the contract of a minor to pay the principal and interest of money loaned him to carry on business is not void, the promise of another to answer for such a debt is within the statute of frauds, and the president of a bank cannot be held liable on a parol promise to become liable to the bank for the overdrafts of a minor; but he is liable to the bank for

party in interest, it has been held that when the contract of a water company with a city declares that it is made for the benefit of the inhabitants, and, *inter alia*, for the protection of private property against destruction by fire, the owner of property which is taxed for water-rent, and is destroyed by fire through the failure of the company to supply a sufficient quantity of water to extinguish the same, may, in his own name, sue the company on its contract with the city: *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340; S. C., 12 S. W. Rep. 554; *Duncan v. Owensboro Water Co.*, (Ky.) 12 S. W. Rep. 557.

The omission to furnish water to extinguish fires does not authorize the owner of property destroyed thereby to maintain an action of tort, since a mere breach, by omission only, of a contract entered into with the public, is not a tort, either direct or indirect, to the private property of an individual: *Fowler v. Athens City Waterworks Co.*, 83 Ga. 219; S. C., 9 S. E. Rep. 673.

The House of Lords has recently elaborated the principles laid down in *Saunders v. Vautier*, 4 Beav. 115; S. C., Cr. &

Wills.
Legacy
Payable in
future.
Accumulations

P. 240, to the effect that (1) When in a will there is an absolute vested gift made payable at a future event, with directions to accumulate the income in the meantime and pay it with the principal, the courts will not enforce the trust for accumulation in which no person has any interest but the legatee, *i. e.*, that a legatee may put an end to an accumulation which is exclusively for his benefit; (2) This rule is as applicable when the legatee is a charity, corporate or unincorporate, as when he is an individual; and (3) When such an accumulation is directed for more than twenty-one years from the death of the testator, and is not effective, for the reason given above, the Thelluson Act, (35 & 40 Geo. 3, c. 98.) prohibiting indefinite trusts for accumulation, does not apply: *Wharton v. Masterman*, [1895] A. C. 186, affirming [1894] 2 Ch. 184.

When a testator devises and bequeathes his entire estate to

trustees, to collect the income therefrom, and divide the net income in specified proportions among his children for their respective lives, and, at the death of each child, gives and devises a specified portion of the corpus of the estate to the child or children of that deceased child, or, and in event of there being none, then to others, the implied intention is that, upon the death of each child, the estate which the trustees formerly had in that portion of the corpus which was given to the child or children of the deceased child, or to others in case there should be no child, should cease and determine, and that that portion of the corpus should vest in the parties entitled thereto, free from the trust: *Realty v. Smith*, (Court of Chancery of New Jersey,) 31 Atl. Rep. 1031.

RECENT DEVELOPMENT OF CORPORATION LAW BY THE SUPREME COURT OF THE UNITED STATES.

By GEORGE WHARTON PEPPER, Esq.

II. RIGHTS OF STOCKHOLDERS AND CREDITORS IN THE PROP- ERTY OF THE CORPORATION.

In the May Number of the AMERICAN LAW REGISTER AND REVIEW¹ an attempt was made by the writer to state the result of recent decisions by the Supreme Court of the United States upon the subject of Corporate Power. The decision in *Central Transportation Company v. Pullman's Palace Car Company*² was examined, and attention was called to certain difficulties in the way of harmonizing some of the views expressed in that case with other decisions by the same Court. It is now proposed to give some consideration to the problems which, in constantly increasing numbers, are being presented to the Court for solution in cases concerning the rights of stockholders and creditors of insolvent corporations.

The ears of the American lawyer have grown accustomed to the assertion that the capital stock of a corporation is a trust fund for the payment of debts. He has heard this trust fund doctrine referred to with pride as an American doctrine and there are not wanting those who find in this circumstance a stimulus to patriotic sentiment and a reason for self-congratulation.³ There seems to be something in the thought of a trust fund for the benefit of creditors which arouses within the lawyer's breast a feeling of legal chivalry; and more than one distinguished judge has become a knight-errant in the service

¹ 34 AM. L. REG., page 296.

² 139 U. S. 24.

³ E. g., Judge SEYMOUR D. THOMPSON: 27 AM. LAW. REV. 846. Judge THOMPSON to some extent modifies his expressions upon this subject in § 2953 *et. seq.* of his recently published Commentaries on Corporation Law.

of this honored doctrine—although in so doing he has laid himself open to the imputation on the part of less sentimental jurists of engaging in a somewhat Quixotic tilt at legal windmills. In the pages of this magazine¹ comments have appeared from time to time upon some of the more notable decisions which purport to be based upon the trust fund doctrine; and in the pages of the *American Law Review*, Mr. Thacher² of New York and the late Mr. McMurtrie³ of Philadelphia have contributed valuable suggestions to the discussion of the general subject.

Whatever this trust fund doctrine may be, it is at any rate certain that the Supreme Court of the United States is definitely committed to it. In *Hamley v. Stutz*,⁴ Mr. Justice BROWN uses the following language:—"Ever since the case of *Sawyer v. Hoag*, 17 Wall. 610, it has been the settled doctrine of this court that the capital stock of an insolvent corporation is a trust fund for the payment of its debts; that the law implies a promise by the original subscribers of stock who did not pay for it in money or other property to pay for the same when called upon by creditors; and that a contract between themselves and the corporation, that the stock shall be treated as fully paid and non-assessable, or otherwise limiting their liability therefor, is void as against creditors. The decisions of this court upon this subject have been frequent and uniform, and no relaxation of the general principle has been admitted: *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Chubb v. Upton*, 95 U. S. 665; *Pullman v. Upton*, 96 U. S. 328; *County of Morgan v. Allen*, 103 U. S. 498; *Hawkins v. Glenn*, 131 U. S. 319; *Graham v. Railroad Co.*, 102 U. S. 148, 161; *Richardson v. Green*, 134 U. S. 30." In a case decided the same year⁵ Mr. Justice HARLAN said:—"In *Sawyer v. Hoag*, 17 Wall. 610, 620, it was held that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund *sub modo* for the

¹ *E. g.*, 32 AM. LAW REG. & REV., 175.

² 25 AM. LAW REV., 940.

³ 25 AM. LAW REV., 749.

⁴ 139 U. S. 417. (1891).

⁵ *Clark v. Beaver*, 139 U. S. 96. (1891.)

benefit of its general creditors There is no dispute here as to the soundness of this general principle." In *Fogg v. Blair*,⁹ decided upon the same day as the preceding case, the same learned justice says, "It is the settled doctrine of this Court that unpaid subscriptions to the stock of a corporation constitute a trust fund for the benefit of its creditors which may not be given away or disposed of by it, without consideration or fraudulently, to the prejudice of such creditors."

In *Camden v. Stuart*,¹⁰ Mr. Justice BROWN reasserts the Court's adherence to the doctrine and says "Nothing that was said in the recent cases of *Clark v. Bever*, 139 U. S. 96; *Fogg v. Blair*, 139 U. S. 118; or *Handley v. Stutz*, 139 U. S. 417, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, etc., etc." In *Potts v. Wallace*,¹¹ Mr. Justice SHIRAS reviews the cases and finds that the law of Pennsylvania is in accord with Federal doctrine upon this point and remarks "It is undoubtedly true that in Pennsylvania in the case of an insolvent corporation, its assets including unpaid capital stock constitute a trust fund." In the same year, in *Swan Land and Cattle Co. v. Frank*,¹² the Court per Mr. Justice JACKSON, gives its assent to the theory that the assets of the corporation "constitute a trust fund for the payment of all debts and demands." If any modification of the statement made above is required, it is as the result of the more guarded assertion of Mr. Justice BREWER in *Hollins v. Brierfield Coal and Iron Co.*,¹³ where the learned judge says:—"While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. As said in *2 Pomeroy's Equity Jurisprudence*, 1046, they "are not in any true and complete sense trusts, and can only be called so by way of analogy or

⁹ 139 U. S. 118.

¹⁰ 144 U. S. 104. (1891.)

¹¹ 146 U. S. 618. (1892.)

¹² 148 U. S. 603. (1892.)

¹³ 150 U. S. 371. (1893.)

metaphor." The Profession has not had an opportunity to ascertain whether or not this suggestion that in dealing with the trust fund doctrine we are living in the domain of metaphor and hyperbole is to be adhered to by the court; for neither in 151, 152, 153, 154, 155 nor 156 U. S. are problems of this character presented to the judges for decision. Accordingly, in the absence of a definite repudiation of the trust fund doctrine, whatever that may be, it seems upon the whole to be justifiable to assert that the Supreme Court is committed to it.

In view of these considerations, it is a matter of no little interest to ascertain just what the trust fund doctrine is, and to determine what the commercial conditions are which seem to have driven the Supreme Court to declare its adherence to a metaphor as a rule of judicial decision.

There are at least three possible views of the true nature of the property of a corporation and of the consequent rights and liabilities of stockholders and creditors. In the first place, the courts might unite in holding that the corporation "is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it," and that "its estate is the same, its interest is the same, its possession of the same."¹⁴ If this view were to prevail, the corporation might deal with its property as an individual may do and might dispose of its property subject only to the limitations which obtain in the case of an individual with respect to the rights of creditors. If balances on stock remained unpaid and the corporation had in no way cut itself off from collecting those balances, creditors might reach them on the ground—and only upon the ground—that they were the property of the corporation in the same way that "bills receivable" are assets of a firm. A creditor's bill would be a mere equitable execution or a means of garnishment available for the creditor who had reduced his claim to judgment at law. The corporation could unquestionably prefer a creditor as an individual may do and it would make no difference whether the creditor happened to be a stranger to the corporation, a stockholder therein or a director thereof. If the stockholder whose balance was unpaid was also a creditor

¹⁴ Mr. Justice BRADLEY in *Graham v. R. R.* 102 U. S. 248. (1880.)

of the corporation on another transaction, he could set-off his claim against the stock debt when called upon to pay either by the corporation or a creditor claiming through it. In short, there would be no such thing as a department of corporation law concerned with the rights of corporate creditors in the property of their debtor, for they would stand before the law in the same position as if they were seeking to enforce their rights against a natural person with no ground for asking for the application of equitable principles unless there was present in the case some such well-recognized basis of equitable relief as fraud upon creditors or a state of affairs for mar-halling of assets, subrogation or the like. In this view of the case it would on principle be immaterial whether or not a contract to pay less than par for stock is regarded as a valid contract. If the courts regard it as valid, no difficulty would arise. If they treated it as impolitic and invalid, a right of rescission would exist in favor of the corporation. There would be either the contract which the parties made or none at all.

In the next place, the courts might agree in treating the property of a corporation as being, so to speak, the product of representations made by each and all of the stockholders to the public to the effect that for each share of stock one hundred per cent. of value had actually been paid in cash, the treasury or had been conveyed to the corporation as property or subsisted in the hands of the stockholder ready to be paid in upon demand. On this view, the rights of creditors would be both greater and less than upon the basis of the doctrine suggested above. A contract made in good faith between a stockholder and the corporation with terms different from those above outlined would not be enforced according to its terms against a creditor; for the latter would be entitled to invoke the doctrine of estoppel for the purpose of subjecting a stockholder to a liability of one hundred per cent. on the dollar, no matter what his actual agreement with the corporation might have been. In other words, this view involves the proposition of substantive law that a contract by which one becomes the owner of stock is necessarily and inevitably an

undertaking upon the part of the stockholder to pay par and a representation to the public that if the par of the stock has not already been paid, the holder will pay it on demand. It would therefore be true, in a sense, that the courts in such a case would not be making a subscriber live up to a bargain entered into by him, but would be making a bargain for him and compelling him to live up to that.¹⁸ On the other hand, as said above, the rights of creditors would be to some extent *less* upon this view. As the basis of the creditor's right is estoppel, it should seem that only those creditors would be entitled to compel payment of par value who become such after the occurrence of the transaction complained of and who give credit in ignorance of the real facts of the case. If the first view were to obtain, it should seem that prior creditors would be entitled to the same relief as subsequent creditors, the basis of their equity being in each case fraud. Nothing in this view of the nature of the creditor's right is inconsistent with the exercise by the corporation of the right of a natural person to set-off, in case of mutual debts, or of the right to prefer a creditor in case of insolvency.

A third possible view would be the view that the corporation is identical with the members that compose it and that it and they hold the corporate property in trust for the benefit of corporate creditors. This view, it will be observed, is entirely distinct from the doctrine based on estoppel and adverted to above. The theory of a trust for creditors necessarily involves the protection of prior and subsequent creditors alike: for otherwise we should have the anomaly of an equitable doctrine existing for the benefit of a class which conceivably might never come into existence to the exclusion of those whose meritorious claims had already accrued. Again, on any known definition of a trust we must have a specific *res* or subject matter, the legal title to which is in the trustee. In the case of a *bona fide* contract between corporation and stockholder that stock shall be treated as full paid when 50 per cent. only has been paid in fact, it is to be observed that no

¹⁸ See the language of Mr. Justice BROWN (then District Judge) in *Flinn v. Bagley*, 7 Fed. Rep. 745. (1881.)

mere trust theory will enable a creditor to reach the unpaid 50 per cent. This follows from the fact that the limitation expressed in the contract is valid between the corporation and the stockholder,—which means that the corporation not only has no legal title to the property represented by the unpaid balance but can never acquire it. We should accordingly have the spectacle of a trustee without right or title to the trust property. On the other hand, no right of preference would exist; for if there is not enough to satisfy all *cestuis que trustent* in full, equality is equity and the trustee must settle with all *pro rata*. It should seem, however, that a right to set-off would exist in favor of a stockholder-creditor, even upon the trust theory: for in no intelligible sense can one individual stockholder be a trustee for those who are creditors of the corporation—that is (on this view) of the stockholders treated in the aggregate; and as far as an individual stockholder is concerned, it is the case of a claim against him and a claim in his favor. It should seem to be immaterial that the claim against him is a claim for the delivery to the corporation of trust property subsisting in his hands. If his obligation is merely to pay trust property to the trustee, and if at the same time the trust fund is liable for the satisfaction of a *bona fide* claim in his favor, why deny the applicability of the doctrine of set-off?

It is believed that these are the only three theories which, upon general legal principles, can be applied to the relations subsisting between the creditors of a corporation, the corporation itself, and its stockholders. It is nevertheless certain that no one of these theories corresponds to the so-called "trust fund doctrine" as recognized in the decisions of the Supreme Court of the United States. This becomes clear if we but glance at the cases already cited and at others which are inseparably connected with them. The Court, it should seem, would recognize the right of an insolvent corporation to prefer a creditor.¹⁶ This is inconsistent with the theory of a trust.¹⁷

¹⁶ *Hollins v. Brierfield Coal and Iron Co.* (190 U. S. 371. 1893) taken in connection with

¹⁷ *Emerson v. Lester*, 118 U. S. 3. (1885.) See 2 N. W. Law Rev. 173-

The court permits a creditor to collect from a stockholder a balance unpaid on his subscription in spite of a contract between the stockholder and the corporation that nothing more shall be deemed due thereon.¹⁸ This also is inconsistent with the theory of a trust. The court will not permit a creditor to file a bill to have the trust property applied to the satisfaction of his claim unless he has first obtained a judgment at law.¹⁹ Here again is a result inconsistent with the theory that a trust exists for the benefit of creditors. The court compels a stockholder who has received a distribution of stock by way of gratuity to respond for the par value thereof, and that, too, only in favor of subsequent creditors; but in the same case refuses to reach a similar result with respect to the recipients of a stock bonus issued as an inducement to subscribe for the bonds of a "going concern" which had run into debt.²⁰ This result is inconsistent with the doctrine of estoppel as is also the decision long ago rendered in *Sawyer v. Hoag*,²¹ and reiterated in *Handley v. Stutz*, (*supra*) that no set-off will be permitted in favor of a stockholder-creditor.

The refusal of set-off and the ignoring of the contract between stockholder and corporation when the rights of a creditor intervene are inconsistent with the property theory. Upon the property theory the liability of the stockholder would be a simple debt and might well be the subject of set-off; while in a case where the corporation has no contract rights against a stockholder, as far as that stockholder is concerned, the corporation has no property which a creditor can reach.

The result of our inquiry is to establish that the so-called Trust Fund Doctrine is a thing different from any one of these three theories—and they, we believe, represent the only possible ways in which general legal principles can be applied to corporate phenomena. If the question of the further development of a legal doctrine was to be settled upon the basis of

¹⁸ *Handley v. Upton*, 102 U. S. 314. (1880.)

¹⁹ *Hollins v. Brierfield Coal and Iron Co.*, 150 U. S. 371. (1893.)

²⁰ *Handley v. Stutz*, 139 U. S. 417. (1891.)

²¹ 17 Wall. 680. (1873.)

pure legal reasoning, these considerations would compel us to abandon further discussion of the "Trust Fund" and to cast aside every thing but the simple property theory since, upon principle, it is the only one to which courts should give their assent. The estoppel theory involves a serious piece of judicial legislation as to what the effect of a contract shall be. This alone is enough to condemn it. The trust theory is, strictly speaking, untenable. It involves a conception which (in the language of Mr. Justice BRADLEY)²² "is at war with the notions which we derive from the English law with regard to the nature of corporate bodies." Followed to its logical conclusion, it would lead to results which could not be tolerated.²³

In the judgment of the writer, however, the development of the law upon this subject is not to be settled upon the basis of pure legal reasoning and a consideration of the true nature of the Trust Fund Theory or Doctrine seems to make this plain. If it is permissible to answer the question as to the nature of this theory or doctrine by way of paradox, the answer is that it is neither a theory nor a doctrine. The name "Trust Fund" is a name given by American courts and American writers to the more or less systematic judicial recognition of a demand of the commercial world. That demand is, in substance, that the liability of a stockholder shall be unlimited up to the par value of his shares and that he shall not be entitled to the benefit of any legal principle which would normally entitle him to an advantage against corporate creditors. This is not a legal theory. It is a commercial condition struggling for recognition in the courts. If this fact had been perceived in the first instance, courts probably would never have undertaken the task of doing the legislature's work. But perceiving dimly the commercial necessity and charmed by the indefinite possibilities suggested by the word "trust," they entered upon the field and they have never been willing to quit it. Any criticism of the cases on this subject which ignores this fact seems to the writer to be perverse and unintelligent. The courts have been doing legisla-

²² *Graham v. R. R.*, 108 U. S. 148. (1880.)

²³ *Hollins v. Brierfield Co.*, 130 U. S. 371. (1893).

tive work. They have reached their decisions upon the basis of practical necessity and they have called in sometimes one legal theory and sometimes another in an attempt to give the result a juristic aspect. Can anyone who reads the decisions of the Supreme Court of the United States doubt that this is the true explanation of their course? In order to make good this point, it is only necessary to refer to the language of Mr. Justice MILLER in regard to set-off in *Sawyer v. Hong*, (*supra*) to the opinion of Mr. Justice HARLAN in *Clark v. Bever*,²¹ and to that of Mr. Justice BROWN in *Handley v. Stutz*.²² The judges even talk about being "embarrassed" by previous decisions when they desire to reach a certain result. If that result can be best attained by invoking the theory of a trust, then the courts without hesitation adopt the trust theory for the purpose of that case. When it is attempted to make a trust decision the basis of an inductive argument, as in the case of *Hollins v. Brierfield Co.*, (*supra*), the court does not shrink from declaring that the use of the term trust in the earlier cases was metaphorical. If the doctrine of estoppel will enable the courts to accomplish an obviously just result, then the doctrine of estoppel is more or less distinctly enunciated. It by no means follows, however, that the doctrine of estoppel is to be applied in the next case which arises or even in a different branch of the same case. In *Handley v. Stutz*, (*supra*) the court affects to perform the impossible task of distinguishing on principle between the status of two sets of stockholders; and holds one set liable and declares that the other set is entitled to immunity. Mr. Chief Justice FULLER and Mr. Justice LAMAR dissented. They were unable to see the distinction. There was no distinction in law but there seemed to be an exigency in fact which called for a distinction in result. Thus Mr. Justice HARLAN, in *Clark v. Bever*, (*supra*) uses the following language in support of the conclusion that a stockholder is not liable to a subsequent creditor for the par value of stock which had been disposed of at its actual value which was less than par—and he uses it with all

²¹ 139 U. S. 96. (1891.)

²² 139 U. S. 417 (1891.).

the confidence which we are accustomed to associate with the enunciation of a principal of law:—"To say that a public corporation, charged with public duties, may not relieve itself from embarrassment by paying its debt in stock at its real value—there being no statute forbidding such a transaction—without subjecting the creditor, surrendering his debt, to the liability attaching to stockholders who have agreed, expressly or impliedly, to pay the face value of stock subscribed by them, is, in effect, to compel them either to suspend operations the moment they become unable to pay their current debts, or to borrow money secured by mortgage upon the corporate property." He follows this up immediately by a general protestation to the effect that the court is not to be understood as modifying "the principles laid down in the cases above cited." The same line of thought characterizes the opinion of the same learned Justice in *Fogg v. Blair*.²⁸ When the facts of the case require that stockholders should be held for the unpaid balance (as in *Camden v. Stuart*, *supra*) it becomes necessary to reassure the Profession that the earlier cases of *Hendley v. Stutz*, *Clark v. Bever* and *Fogg v. Blair* are not to be regarded as having established a principle of immunity in favor of the stockholder.

If this view of the case is correct it seems too clear for argument that the mass of decisions is so great that a return to first legal principles is an impossibility. The only practical question is that which relates to the means of perfecting the work of judicial legislation which is at present in an unfinished condition. That it is in an unfinished condition scarcely admits of dispute. The impossibility of predicting the view which the court will take of a given commercial condition is admirably brought out by Mr. Edward Avery Harriman in some recent papers in the *Northwestern Law Review*.²⁹ He exposes the fallacy underlying the attempt of Judge SEYMOUR D. THOMPSON to overthrow *upon principle* the doctrine that

²⁸ 139 U. S. 118. (1891.)

²⁹ Vol. II, No. 6, page 167, "The Power of Corporations to prefer Creditors;" Vol. III, No. 4, page 115, "Corporate Assets as a Trust Fund for the benefit of Creditors;" Vol. III, No. 7, page 306, "Corporate Assets as a Trust Fund for the benefit of Creditors."

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LEWEY v. H. C. FRICKE COAL CO. SUPREME COURT OF
PENNSYLVANIA. MARCH 11, 1895.

Statute of Limitations—Ignorance of Cause of Action.

In an action of trespass to recover damages for the unlawful mining of coal under plaintiff's land, the equitable rule that the statute of limitations shall run only from discovery, or a time when discovery might have been made, should be applied.

As equity is administered in Pennsylvania through the common law forms of action, the plaintiff should not be turned out of a court of law in order to be admitted at the equity side of the same court. He may, therefore, in an action of trespass for illegal mining, recover compensation in the same manner that he would on a bill for account.

In such a case the jury should be instructed that, while the statute of limitations may be available as against the penal consequences of the trespass, it is not available as a defence against payment for the coal actually taken and converted to the use of the defendant. *It seems* that even in law the statute of limitations runs against an injury committed in or to a lower stratum, only from the time of actual discovery, or the time when discovery was reasonably possible.

Opinion of WILLIAMS, J.: "Mere ignorance will not prevent the running of the statute in equity any more than at law; but there is no reason resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer. It seems to be the general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close. The fact that his land is a forest and that the defendant goes into its interior to trespass by the cutting of timber,

does not relieve against its operation. What is plainly visible he must see at his peril, unless by actual fraud his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface.

The case at bar affords an excellent illustration of ignorance due to the defendant's conduct and without fault on the part of the plaintiff.

The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations and for its own convenience it pushed an entry or passage under the plaintiff's lands and appropriated the coal removed therefrom. It was bound to know its own lines and keep within them. If by mistake or for any other reason it did invade the mineral estate of another and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact and pay for the coal taken. Its failure to do this is in its effects a fraud upon the injured owner, and if he has no knowledge of the trespass and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute."

THE OPERATION OF STATUTES OF LIMITATIONS IN CASES OF IGNORANCE OR CONCEALMENT OF THE CAUSE OF ACTIONS.

There are in the books two cases whose facts are substantially identical with those of the principal case.

The first of these, *Hunter v. Gibbons*, 1 H. & N. 459,

decided in 1856 in the Court of Exchequer, was the case of an application to be allowed to reply, as an equitable answer (under § 85, C. L. Procedure Act, 1854) to a plea of the statute of limitations, in an action for trespass to coal lands,—that the trespasses were underground, and had been fraudulently concealed from the plaintiff till within six years before suit. The application was refused, and POLLOCK, C. B., said : —“ It would be highly mischievous, and would open the door to a flood of litigation, if we decided that this replication could be pleaded. No case has decided that fraud is an answer to every matter that may be set up as a defence. Plaintiff must go into equity and obtain redress, which that court ought to give him if his contention here is well founded. Plaintiff complains of a trespass to his land. Defendant answers that the act was done so long ago that it cannot be called in question in a court of law. To that plaintiff purposes to reply fraud. Plaintiff's counsel cited one authority to show that where there has been a fraud the statute cannot be set up. If that were so, if a man could reply to a plea of the statute that his debtor had prevented him from suing by fraud, the equitable replications would be as common as the promises of payment which people used to prove before Lord Tenterden's Act. . . . No sort of litigation would be likely to be more lasting or expensive than a question whether, fifteen years ago, a man took his neighbor's coal by mistake or fraud.”

ALDERSON, B., added : “ The terms of the enactment are absolute, and there is no provision for the case where a person is prevented from suing by fraud. Such being the plain meaning of the words, plaintiff now calls upon us to say that notwithstanding the statute a person may maintain an action, if prevented by fraud from suing. But it is for the legislature, not for us, to say that. There is no distinction between trespasses underground and upon the surface.”

The other case is *Williams v. Pomeroy Coal Co.*, 37 Ohio State, 583 (1882). There, the lessee of a coal mine worked over into the land of an adjoining proprietor, and after taking out all the coal from the demised premises, surrendered his lease. The plaintiff, having subsequently purchased the adjoin-

ing land, in mining thereon, in ignorance of the overworking of defendant, struck such working, whereby the water from the abandoned mine overflowed his own. In an action for damages against the former lessee, it was held that he was not liable as for nuisance, not having been the owner of the land; and that the plea of the statute was good as to the action for trespass, the court maintaining that, in the application of the statute, there is no distinction between trespasses underground and upon the surface, nor whether the cause of action is known or unknown to the plaintiff within the time limited by the statute, and further, that the bar to a recovery in an action for a trespass includes all the consequences resulting from such trespass. Citing *Hunter v. Gibbons* (*supra*).

The present case, although in form an action at law, is professedly decided upon equitable principles, and does not, therefore, come within these rulings.

The case of *Gibbs v. Guild*, 3 Q. R. D. 59 (1882), presents a similar state of affairs. There it was held that the replication of concealed fraud and absence of reasonable means of discovery, in an action for money lost by defendant's representations, was good upon equitable principles; and since the Judicature Act, practically abolishing distinctions between law and equity, would be admissible in the Court of Appeal.

As a general rule, in equity, where the injured person has been kept in ignorance of his right to sue, by affirmative, fraudulent conduct of the defendant, the statute of limitations does not begin to run until the cause of action has been discovered or become known, or until it might have been discovered by a reasonable use of the available means.

This is equally true in the case where the concealment is an inherent incident of the original wrong—that is to say, where the wrong complained of is of a fraudulent character, thus necessarily involving concealment,—and in the case where to this fraud there are superadded positive acts intended to prevent a discovery.

These propositions are practically unquestioned, and in many states have been extended by statute to actions at law. (See Wood on Limitations, p. 362.)

See also, as illustrative cases, decided under such statutes, *Taylor v. R. R. Co.*, 13 Fed. 152; *Vigus v. O'Bannon* (Ill.), 8 N. E. 778; *Shrevcs v. Leonard* (Ia.), 8 N. W. 749; *Barlow v. Arnold*, 6 Fed. 351; *Losch v. Pickett* (Kan.), 12 Pac. 822; *Tompkins v. Hollister* (Mich.), 27 N. W. 651; *Bank v. Perry* (Mass.), 11 N. E. 81; *Leavenworth Co. v. Ry. Co.*, 18 Fed. 209; *Ripcr v. Howard* (N. Y.), 13 N. E. 632; *Dickon v. Hays* (Pa.), 7 Atl. 58; *O'Dell v. Rogers* (Wis.), 30 N. W. 229; *Boyd v. Blankman*, 29 Cal. 19 (1865); *Wear v. Skinner*, 46 Md. 257 (1873); *Commissioners v. Smith*, 22 Minn. 97. (1875); *Cock v. Van Etten*, 12 Minn. 522; *Parker v. Kuhn*, 21 Neb. 413 (1887); *Marbourg v. McCormick*, 23 Kan. 24 (1879); *Walker v. Soule*, 138 Mass. 510 (1885).

Where the matter is regulated by enactment, providing that the statute shall run in actions for relief against fraud, etc., only from the date of discovery, actions not based on fraud are held not to come within the saving: *Howk v. Minnick*, 19 O. St. 462 (1869); *District of Boomer v. French*, 40 Ia. 601 (1875); *Gall v. McDaniel*, 72 Cal. 334 (1887).

In *Quinby v. Blackey*, 63 N. H. 77 (1884), the court said: "The fraud by which a cause of action is concealed need not be other than that which caused the original injury, in order to avoid the operation of the statute of limitations.

"The defendants' neglect to give information to the plaintiff of the finding of his money, and to restore it to him, knowing it was his, was a fraud. By their silence and inaction afterward, 'the original fraud was kept on foot.' Their wilful silence was a fraudulent concealment of plaintiff's cause of action, and constitutes a sufficient answer to the plea of the statute."

Mr. Justice MILLER, in the leading case of *Bailey v. Glover*, 21 Wall. 342 (1874), said: "The appellant relies upon a proposition which has been very often applied by the courts under proper circumstances in mitigation of the strict letter of general statutes of limitations, namely, that when the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it.

This proposition has been incorporated in different forms in the statutes of many of the states, and presented to the courts under several aspects where there were no such statutes. And while there is unanimity in regard to some of these aspects there is not in regard to others.

In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

A long list of authorities may be cited: *Booth v. Lord Warrington*, 4 Bro. Parl. Cas. 163; *South Sea Co. v. Wymondsell*, 3 P. Wms. 143; *Hovenden v. Lord Annesly*, 2 Sch. & Lefroy, 634; *Stearnes v. Page*, 7 How. 819; *Moore v. Greene*, 19 How. 69; *Sherwood v. Sutton*, 5 Mass. 143; *Snodgrass v. Bank*, 25 Ala. 161; *Bowman v. Sanborn*, 18 N. H. 205; *Way v. Cutting*, 20 N. H. 187; *Wear v. Skinner*, 46 Md. 257; *Short v. McCarthy*, 5 E. C. L. R. 403; *Brown v. Howard*, 6 E. C. L. R. 43; *Granger v. George*, 11 E. C. L. R. 406; *Michoud v. Girod*, 4 How. 503 (1846); *Veazie v. Williams*, 8 How. 134; *Meador v. Norton*, 11 Wall. 442 (1870); *Brown v. Buena Vista*, 95 U. S. 157; *Rosenthal v. Walker*, 111 U. S. 185; *Traer v. Clews*, 115 U. S. 528 (1885); *Kirby v. Lake Shore, &c., R. R. Co.*, 120 U. S. 130 (1886); *Ferris v. Henderson*, 12 Pa. 49 (1849); *Payne v. Hathaway*, 3 Vt. 212; *O'Dell v. Burnham* (Wisc.), 21 N. W. 635; *Bradford v. McCormick* (Ia.), 32 N. W. 93; *McAlpine v. Hedges*, 21 Fed. 689; *Carr v. Hilton*, 1 Curtis C. C. 238; *Vane v. Vane*, L. R. 8 Ch. 383; *Rolf v. Gregory*, 4 De G. J. & S. 576; *Buckner v.*

Calcote, 28 Miss. 568; *Lewis v. Welch*, 48 N. W. 608 (Minn. 1891); *Manatt v. Starr*, 72 Ia. 677 (1887); *District of Boomer v. French*, 48 Ia. 601; *Wilder v. Lescr*, 72 Ia. 161 (1887); and many others that might be cited.

It would seem, however, that even in equity, "The concealment which will avoid the statute must go beyond mere silence. It must be something done to prevent discovery . . . some trick or contrivance intended to exclude suspicion and prevent inquiry:" *Wood v. Carpenter*, 101 U. S. 185 (1879); *Boyd v. Boyd*, 27 Ind. 429; *Stanley v. Stanton*, 36 Ind. 445; *Shreves v. Leonard* (Ia.), 8 N. W. 749; *Stewart v. McBurney* (Pa.), 1 Atl. 639; *Jackson v. Buchanan*, 59 Ind. 370; *Pilcher v. Flinn*, 30 Ind. 202.

Mere constructive fraud is not enough: *Farnam v. Brooks*, 9 Pick. 212 (1830); *Wilmerding v. Russ*, 33 Conn. 67 (1865), where an administrator sold stocks of the estate to himself, crediting the estate with their market value, and transferring them to a friend to hold for him, and it was held that, the circumstances not showing actual fraud, the statute ran from the date of the sale.

Silence or failure to notify the other party of the existence of a cause of action does not amount to a fraudulent concealment, the means of discovery being available to both parties, and the defendant not having such peculiar facilities for knowledge as to cause him to stand in a fiduciary relation: *Shreves v. Leonard* (Ia.), 8 N. W. 749; *Stewart v. McBurney* (Pa.), 1 Atl. 639; *Wynne v. Cornelison*, 52 Ind. 312; *Warr v. State*, 74 Ind. 181; *Churchman v. Indianapolis*, 110 Ind. 259.

In a case where a debtor disclosed to the personal representatives of his creditor the fact of his indebtedness, his omission to state its amount was held not to be such fraudulent concealment as would toll the statute: *Sankry v. McElroy*, 104 Pa. 265 (1883).

In some jurisdictions it is held that ignorance of the cause of action is of no avail to avoid the statute, unless there be proof either of actual fraudulent concealment, or of something in the nature of the cause of action which would tend to make it conceal itself.

An averment of "no knowledge or means of knowledge" has been held insufficient: *Phelps v. Elliot*, 29 Fed. 53 (1886); *Dee v. Hyland* (Utah), 3 Pac. 388.

Furthermore, "a party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it." . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence:" *Wood v. Carpenter*, 101 U. S. 185 (1879); *Buckner v. Calcutt*, 28 Miss. 432; *Nudd v. Hamblin*, 8 Atl. 130; *Cole v. McGlathry*, 9 Me. 131; *McKown v. Whitman*, 31 Me. 448; *Rouse v. Southard*, 39 Me. 404; *Ormsby v. Longworth*, 11 Ohio St. 653; *Ainsfield v. More*, 46 N. W. 828 (Neb. 1890); *Wilton v. Merrick Co.* (Neb.), 20 N. W. 111; *Pearce v. Curran* (R. I.), 3 Atl. 419; *Cummings v. Bannion* (Md.), 8 Atl. 357; *Vigus v. O'Bannon* (Ill.), 8 N. E. 778; *Murphy v. Reedy* (Miss.), 2 So. 167; *Mathias v. O'Neil* (Mo.), 6 S. W. 253; *Board v. Vincent* (Mich.), 33 N. W. 44; *McAlpin v. Hedges*, 21 Fed. 689; *Simmons v. Baynard*, 30 Fed. 532; *Laird v. Kilbourne* (Ia.), 30 N. W. 9; *Perry v. Smith* (Kan.), 2 Pac. 784; *King v. McKellar* (N. Y.), 16 N. E. 201; *Hughes v. Bank* (Pa.), 1 Atl. 417; *Chetham v. Hoare*, L. R. 9 Eq. Cas. 571 (1870); *Norris v. Haggin*, 28 Fed. 275 (1886).

"In actions seeking relief on the ground of fraud, where the statute of limitations has created a bar, the cause of action is not considered as having accrued until the discovery by the aggrieved party of the facts constituting the fraud complained of; but this does not absolve him from all effort or diligence to obtain such knowledge; and facts of which he might have obtained knowledge had he sought it from its natural sources of information, which were at his command, will be deemed within his knowledge:" *Taylor v. S. & N. Alabama R. Co.*, 13 Fed. 152 (1882).

In equitable actions seeking relief against the consequences of a mistake, the statute runs from the time when the mistake is or should have been discovered: *Gould v. Emerson*, 160

Mass. 438 (1894); *Manatt v. Starr*, 72 Ia. 677 (1887); *Hunter v. Spottswood*, 1 Wash. 145; *Massie v. Haskill*, 80 Va. 789 (1885); *Cranmer v. McSword*, 24 W. Va. 594; (1884).

"While it is true that mistakes of law when standing alone, cannot usually furnish a ground for equitable relief, yet where one has the right to and does rely upon another, who omits to state a most material legal consideration within his knowledge and affecting the other's rights, but of which the other is ignorant, and *acts* under this misplaced confidence, and is misled by it, a court of equity will afford relief, especially if such action inures to the advantage of the person whose advice is taken, even though no fraud was intended: *Tompkins v. Hollister*, 60 Mich. 470 (1886).

The cases dealing with the question in equity may be classified according to their opposite conceptions as to the binding force of the statute in courts of chancery. The great majority of the authorities hold that the statute is followed only by analogy, and as expressing in a convenient form an equitable doctrine: *Humbert v. Trinity Church*, 24 Wend. 587 (1840), and cases cited; *York v. Bright*, 4 Humph. (Tenn.) 312 (1843); *Norris v. Haggin*, 28 Fed. 275, 277; *Brooksbank v. Smith*, 2 Y. & C. 58 (1836); ALDERSON, B.

But, it has been held in Massachusetts, on the one hand, that "the statute operates as a bar in equity of its own force and not by the discretion of the court: *Farnam v. Brooks*, 9 Pick. 212 (1830); and, on the other hand, in West Virginia, that "in a suit in equity to enforce a purely equitable demand, the defence of the statute can have no application of itself or, by analogy to any limitation in courts of law. Such cases must be determined by courts of equity upon rules and principles of their own:" *Cranmer v. McSwords*, 24 W. Va. 594 (1884).

As to the application of the foregoing rules in actions at law, there is an irreconcilable conflict of authority in America.

In *Bailey v. Glover* (*supra*), MILLER, J., said: "Many of the courts hold that the rule is sustained in courts of equity,

only on the ground that those courts are not bound by the mere force of the statute as courts of common law are, but only as they have adopted its principle as expressing their own rule of applying the doctrine of laches in analogous cases. They, therefore, make concealed fraud an exception on purely equitable principles: *Troup v. Smith*, 20 Johns. 33; *Callis v. Waddy*, 2 Munf. 511; *Miles v. Barry*, 1 Hill (S. Car.), 296; *York v. Bright*, 4 Humph. 312.

On the other hand, the English courts and the courts of Connecticut, Massachusetts, Pennsylvania, and others of great respectability, hold that the doctrine is equally applicable to cases at law: *Bree v. Holbeck*, Douglas, 655; *Clarke v. Hougham*, 3 Dowl. & Ryl. 322; *Granger v. George*, 5 B. & C. 149; *Turnpike Co. v. Field*, 3 Mass. 201; *Welles v. Fish*, 3 Pick. 75; *Jones v. Caraway*, 4 Yeates, 109; *Rush v. Barr*, 1 Watts, 110; *Pennock v. Freeman*, 1 Watts, 401; *Mitchell v. Thompson*, 1 McL. 9; *Carr v. Hilton*, 1 Curtis, 230.

* * * * *

"We are of opinion, that the weight of authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded on a sound and philosophical view of the principles of the statutes of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it conceals itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And we see no reason why this principle should not be as applicable to suits tried on the common law side of the court's calendar as to those on the equity side."

It must be remembered that this case was in equity, and was decided under a statute of limitations which applied by its own language, to courts of equity as well as those of law;

and the court premised: "If there be an exception to the universality of its language, it must be one which applies under the same state of facts to suits at law as well as to suits in equity."

The following additional cases apply the rule in common law actions: *Mitchell v. Buffington*, 10 W. N. C. 361 (1881); *McDonnell v. Potter*, 8 Pa. 189 (1848); *Jones v. Conway*, 4 Yeates, 109 (1804); *Ferris v. Henderson*, 12 Pa. 49 (1849); *Pennock v. Freeman*, 1 Watts, 401 (1833); *Glenn v. Lightner's Exr.*, 40 Pa. 199 (1861); *Morgan v. Tener*, 83 Pa. 306 (1877); *Wickersham v. Lee*, 83 Pa. 416 (1877); *First Mass. Turnpike v. Field*, 3 Mass. 201 (1807); *Willes v. Field*, 3 Pick. 74; *Rush v. Barr*, 1 Watts, 110 (1832, 1825); *Hughes v. Bank*, 110 Pa. 428 (1883).

The fraudulent concealment pleaded in suspension of the statute need not be proved, in civil actions, beyond reasonable doubt: *Ossipee v. Grant*, 59 N. H. 70 (1879).

Where the aggrieved party was ignorant that the defendant had any connection with the transaction, it is not necessary, in order to arrest the bar of the statute, to prove diligent efforts to fasten the fraud on such defendant: *Clews v. Tracer*, 57 Ia. 459 (1881).

The other side of the controversy is epitomized in *Troup v. Smith*, 20 Johns. 33. This was assumpsit for negligence, want of skill, and fraud in making a survey, the land being so covered with trees that the plaintiff did not discover the defects in the survey until after the statutory period had elapsed. SPENCER, C. J., said:

"There is a marked and manifest distinction between a plea of the statute of limitations in a court of law and in a court of equity. The best and fullest view of the effect in a court of equity is given by Lord Redesdale, in 2 Sch. & Lef. p. 634. He says, that although the statute does not, in terms, apply to suits in equity, it has been adopted there as a rule prescribed by the legislature; and the reason he gives, why, if the fraud has been concealed by the one party, until it has been discovered by the other, within six years before the commencement of his suit, it shall not operate as a bar, is this;

that the statute ought not, in conscience to run, the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time. This is very intelligible and sound doctrine in a court of equity; and is, I apprehend, the true and only tenable ground to deprive a defendant of the benefit of the plea. Courts of equity not being bound by the statute any further than they have seen fit to adopt its provisions as a reasonable rule, and then only in analogy to the general doctrine of that court, are perfectly right in saying that a party cannot, in good conscience, avail himself of the statute when, by his own fraud, he has prevented the other party from coming to a knowledge of his rights, until within six years prior to the commencement of the suit. But courts of law are expressly bound by the statute; it relates to specified actions; and it declares that such actions shall be commenced and sued within six years next after the cause of such actions accrued, and not after; thus not only affirmatively declaring within what time these actions are to be brought, but inhibiting their being brought after that period. I know of no dispensing power which courts of law possess and arising from any cause whatever; and it seems to me that where the legislation in the same statute gives an extension of time [in certain cases] that it would be an assumption of legislative authority to introduce any other proviso."

In *Campbell v. Vining*, 23 Ill. 525 (1860), the court said: "The courts in Massachusetts, Georgia and Pennsylvania hold the doctrine, that as against a right of action dependent on the existence of a secret fraud, the statute of limitations runs only from the period of the discovery of the fraud. In all those cases, the courts bend the statute of limitations to include cases not within its operation, as those states have no chancery courts. They all refer to the dictum of Lord Mansfield in *Bree v. Holbeck*. . . . It is very clear, this eminent judge does not lay down the general doctrine that fraud may, in all cases, be applied to a plea of the statute, as the courts before referred to have done, and on the strength of his dictum. He merely says: "There may be cases," without specifying them. See *Short v. McCarthy*, 5 E. C. L. R. 403; *Brown v. Howard*, 6

E. C. L. R. 43; *Granger v. George*, 11 E. C. L. R. 406; *Leonard v. Pitney*, 5 Wend. 31; *Allen v. Mille*, 17 Wend. 202; *Smith v. Bishop*, 9 Vt. 116; *Collis v. Waddy*, 2 Munf. 511; *Hamilton v. Shepperd*, 3 Murph. 115; *Thompson v. Blair*, *Ibid.* 583; *Miles v. Barry*, 1 Hill (S. C.), 191; *Pyle v. Beckwith*, 1 J. J. Marshall, 445; *Ellis v. Kelso*, 16 B. Mon. 296 (1857).

In *Freeholders of Somerset v. Veght*, 44 N. J. L. 509 (1882), it was held that courts cannot engraft on the statute exceptions not contained therein, however inequitable the enforcement of the statute without such exceptions, may be. The fraudulent concealment of a cause of action does not justify the inference of a new promise which will check the operation of the statute at law. MAGIE J., after a review of the authorities, concluded that there was no well considered English case upholding the rule contended for, and that the American cases on that side were explainable by peculiarities of the cases, or by the fact that in the states where they were decided there were no separate courts of chancery.

Where there is no proof either of fraud, or of the absence of reasonable means of discovery, mere ignorance of the cause of action is still less a bar to the running of the statute at law than in equity; and here, as there, means of knowledge equals knowledge.

In *Nudd v. Hamblin*, 8 Atl. 130 (1864), it was held that the omission to disclose a trespass upon real estate to the owner, if there is no fiduciary relation between the parties, and the owner has the means of discovering the facts, and nothing has been done to prevent his discovery, is not such a fraudulent concealment as will prevent the operation of the statute; the court saying: "The plaintiff had the means of ascertaining the cause of action by the exercise of ordinary vigilance, and as defendant took no pains to conceal his acts, either while he was committing the trespasses or at any time afterwards, his mere neglect to go to the plaintiff and give her information of what he had done, is not such concealment on his part as the statute contemplates."

See, also, *Foster v. Rison*, 17 Gratt. 321; *Campbell v. Long*, 20 Ia. 382; *Bassand v. White*, 9 Rich. Eq. (S. C.), 483;

Bank v. Waterman, 26 Conn. 324; *Abell v. Harris*, 11 G. & J. (Md.) 361; *Martin v. Bank*, 31 Ala. 115; *Davis v. Cotton*, 2 Jones Eq. (N. C.) 430; *Flemming v. Colbert*, 46 Pa. 498; *Moore v. Juvenal*, 92 Pa. 484 (1880); *McDowell v. Potter*, 8 Pa. 189 (1848); *Owen v. Western Saving Fund*, 97 Pa. 47; *Campbell's Admr. v. Boggs*, 48 Pa. 524 (1865); *Steele's Admr. v. Steele*, 25 Pa. 154 (1855); *Jordan v. Jordan*, 4 Greenl. 175; *Thomas v. White*, 3 Litt. 177; *Fralcy v. Jones*, 52 Mo. 64; *Wells v. Halpin*, 59 Mo. 92; *Gebhard v. Sattler*, 40 Ia. 153; *Brown v. Brown*, 44 Ia. 349; *Phoenix Ins. Co. v. Dankwardt*, 47 Ia. 432; *Higgins v. Mendenhall*, 51 Ia., 135; *Hecht v. Slancy*, 14 Pac. 88 (Cal. 1887); *Murphy v. Reedy*, 21 So. 167 (Miss. 1887); *Cotton v. Brown*, 4 S. W. 294 (Ky. 1887); *Brown v. Houdlette*, 10 Me. 339; *Pearce v. Curran*, 15 R. I. 298 (1886); *Cockrell's Exr. v. Cockrell*, 15 S. W. 1119 (Ky. 1891); *Perry v. Elgin*, 26 S. W. 4 (Ky. 1894); *Moore v. Boyd*, 74 Cal. 167 (1887); *Cooper v. Lee*, 21 S. W. 998 (Tex. 1892); *Purdon v. Seligman*, 43 N. W. 1045 (Mich. 1889); *Bishop v. Little*, 3 Me. 405; *Fritschler v. Koehler*, 83 Ky. 78 (1885); *Commissioners v. Smith*, 22 Minn. 97; *Conner v. Goodman*, 104 Ill. 365; *Adams v. Ipswich*, 116 Mass. 570; *Mast v. Easton*, 33 Minn. 161 (1885); *Buckle v. Chrisman's Admrs.* 76 Va. 678 (1882); *Furlong v. Stone*, 12 R. I. 437 (1879); *Smith v. Bishop*, 9 Vt. 110; *Schultz v. Board*, 95 Ind. 323; *Binney v. Brown*, 116 Pa. 169.

In some instances it has been held that, although means of discovery were open, the circumstances were such as to justify the plaintiff in failing to employ such means. See *Mitchell v. Buffington*, 10 W. N. C. 361 (1881); *Falley v. Gribbling*, 26 N. E. 794 (Ind. 1891); *Scherer v. Ingberman*, 110 Md. 428; *Bradford v. McCormick*, 71 Ia. 129 (1887).

A mere suspicion of wrong is not tantamount to a discovery of the fraud so as to start the running of the statute: *Mer-bour v. McCormick*, 23 Kan. 24 (1879).

S. D. M.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & ELLIS, Esq., 136 Chestnut Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. By SIR FREDERICK POLLOCK, Bart., M.A., LL.D., and FREDERIC WILLIAM MAITLAND, LL.D. Two Volumes. Cambridge: The University Press. Boston: Little, Brown & Co. 1895.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-III. San Francisco: Bancroft-Whitney Co. 1895.

HAND-BOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY. St. Paul: West Publishing Co. 1895. (No. 8, Hornbook Series.)

YOUR WILL; HOW TO MAKE IT. By GEORGE V. TUCKER. Boston: Little, Brown & Co. 1895.

OUTLINE OF THE INFRINGEMENT OF PATENTS FOR INVENTIONS, NOT DESIGNS. By THOMAS B. HALL. New York and Albany: Banks & Brothers. 1895.

SELECTED CASES, ETC.

AMERICAN RAILROAD AND CORPORATION REPORTS, Annotated. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

AMERICAN ELECTRICAL CASES. With Annotations. Volume III. 1889-1892. Edited by WILLIAM W. MORRILL. Albany: Matthew Bender. 1895.

PAMPHLETS.

THE QUIZZER SERIES. Nos. 8 and 9. Questions and Answers on Common Law Pleading (No. 8). By GRIFFITH OGDEN ELLIS and EMIL W. SNYDER. Questions and Answers on Corporations (No. 9). By WM. C. SPRAGUE. Detroit: The Collector Publishing Co. 1895.

UNIFORM STATE LEGISLATION. By FREDERIC J. STIMSON. A Paper Submitted to the American Academy of Political and Social Science. Publication No. 145, of the American Academy of Social Science, Philadelphia. 1895.

BOOK REVIEWS.

ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA. By CHARLES BORGEAUD. Translated by CHARLES D. HAZEN, Professor of History in Smith College, with an introduction by JOHN M. VINCENT, Associate of the Johns Hopkins University. New York and London: Macmillan & Co. 1895. \$2.00.

The essay which forms the basis of this volume won for its author the Prix Rossi for 1892, awarded by the Faculty of Law of the University of Paris, and that in spite of the fact that in it he dared to controvert some of the preconceived opinions of his judges as to matters of great importance in French eyes, such as the character of the fundamental law of that nation, and the relation of the French people to the making and remaking of their constitution. But it was nevertheless most cordially praised by those who awarded the prize; and it will be sure to win no less commendation from all who study it carefully.

In the execution of his task, the author sharply differentiates between charter and popular constitutions:—between those granted by a sovereign to his subjects, apparently as an act of grace, and those imposed by the people upon themselves. This distinction is a very important one: for the power that grants can also, *if it be strong enough*, take away what has been granted; and a charter constitution therefore lacks one important element of stability, or rather of security, which a popular constitution possesses. But as the author clearly points out, such compacts, in monarchical states, furnished the only means of reconciling the past with the present; and were therefore a necessity, if men would secure their liberties and at the same time avoid the dangers of a revolution.

There are many interesting passages in this work, but perhaps none more so than the opening chapters, in which the author traces the development of the idea of a written, as distinguished from a traditional constitution, and finds the first clear evidence

of it in the theories of the English Puritans, and its first prolific germs in their system of church government. "Upon the point of founding a republic, they went about it in the same way as they would to organize a church congregation. They wished to base it upon a formal compact, emanating from the social body, which they naturally were compelled to regard as the possessor of sovereignty." This, then, was the origin of popular constitutions: charter constitutions came later, after the French Revolution had sown the new ideas broadcast throughout Europe, and sovereigns were compelled to yield a part of their prerogatives, or risk losing all.

Starting with this, Mr. BORGEAUD points out how the Puritan theory, carried with its adherents to America, there sprang into leaf in the early compact into which the people of various colonies entered, blossomed in the Articles of Federation, bore fruit in the constitution of the United States, and has been ripening ever since, through the changes in that document and in the State Constitutions; and then shows how France, in emulation, not in imitation, of this system, worked out a constitutional theory of her own, which though in some respects fallacious, is nevertheless the prevailing one in Europe.

The first part of the work closes with a chapter on the Nature of Written Constitutions, which gives a very clear summary of the scope and limitations of such a document, and at the same time points out how necessary it has become to overstep in many instances the theoretical bounds of a constitution, and incorporate into it matters which belong properly to the domain of legislation, but with which the legislative power has shown itself unfit to be entrusted. The author differs from the opinions expressed by Governor Russell of Massachusetts, in his address at the Commencement of the Yale Law School, printed in the July, 1894, number of this Magazine, (1 AM. L. REG. & REV. N. S. 481,) and while admitting that, in a general way, it may be said that a constitution ought not to contain matters of detail, yet urges strongly the importance of securing the first aim of a written constitution, efficient protection against abuse of power. And again, speaking of the length of some recent American Constitutions, he says:

" Does this mean that the Americans are wrong? Not at all. They have sought a means of efficient self-protection against the corruption and intrigue which have too often dishonored their legislatures. The constitution offered them this means; it was made, in fact, for that purpose. They have not diminished the grandeur of their constitutions by entrusting them with the care of matters which they feared would otherwise be mismanaged, however long the list of these may be." Verily these words have a ring of solid common sense.

In the second part of the book he discusses the subject of Royal Charters and Constitutional Compacts; and in the third that of Democratic Constitutions, which more nearly concerns us. He perceives clearly that it is in the history of the State Constitutions, not in the Federal Constitution, that growth is to be looked for; and he very ably traces the development of modern constitutional ideas through the successive conventions which gave to their respective states new constitutions, new not merely in the sense of being made over, but of incorporating new ideas and measures. One most interesting point, and one that is probably known to but few, is, that in the Pennsylvania Convention of 1837-8 a modified form of the popular initiative, now on trial in Switzerland, was proposed and rejected; which was not strange, as its purpose at that time was to hinder constitutional amendments, rather than facilitate them, as is the modern idea.

From America he passes to France; and here his treatment of his subject is of course fuller, and his knowledge more extensive. But no other portion of his work has the interest of the concluding chapters on Switzerland, for the reason, as mentioned above, that there new ideas are being experimented with for the edification of the rest of the world. Of these, the most important is the lodging of the initiative to a certain extent in the hands of the people. That power, which is "the right to lay a proposition before the constitution-making power, the acceptance of which will itself be an exercise of this power," is with us lodged in the hands of the legislature. In Switzerland they have gone further. Early in this century the constitutions of some of the democratic cantons had already given

this power to a certain number of citizens; and it now exists, to a greater or less extent, in the majority of the cantons. The Federal Constitution of 1848 contained an article which required the Federal Assembly, on demand (by petition, probably,) of 50,000 voters, to submit the question of amendment to the people, and if it was decided in the affirmative, then to prepare amendments. In 1891, however, this constitution was amended, by providing that the petition for amendment might demand the enactment, abolition or alteration of certain articles of the constitution, and that, if the vote of the people was in favor of amendment, then the revision should be taken in hand by the Assembly *in the sense of the people.*" This, it will be seen, introduces a new element into the making of a constitution; and Mr. BORGEAUD fully and clearly points out the inconvenience and danger that may result therefrom. But the impression he leaves on the mind is, that he is by no means bitterly opposed to it, at least in a carefully restricted form. It will probably be a long time, however, before America follows in the footsteps of her sister republic in this respect.

After what has already been said, it would be idle to attempt further commendation, lest it might defeat its own object. It is far better to let the book speak for itself. This much can safely be added, that Mr. BORGEAUD's work is indispensable to the student of constitutional history; that in it he will find a store of material that it would be impossible to amass otherwise, without a great expenditure of time and labor; and that he will find the author's views and criticisms well deserving of the most careful attention. One other point may also be noticed. It is of course difficult to tell whose is the credit, author's or translator's; but at any rate, the book is written in a style very pleasantly different from the usual Gallic "artificial-flowery" style, so that it will please the literary, as well as the intellectual taste of the reader.

R. D. S.

A MANUAL OF PUBLIC INTERNATIONAL LAW. By THOMAS ALFRED WALKER, M.A., LL.B. Cambridge: The University Press. New York: MacMillan & Co. 1895.

"In the course of work as college lecturer in Cambridge," says the author in his preface, "I have on many occasions been asked to recommend for the use of students commencing to read Public International Law some text book which, whilst excluding unnecessary detail and mere theoretic discussion, might well serve as a fairly comprehensive general introduction to detailed study of the subject. No English treatise which has fallen into my hands fully satisfying the conditions which I should require in such a book, I have in this volume attempted to supply the need."

Nevertheless Mr. Walker's manual will necessarily be brought into competition and considered in comparison with a work which has since its appearance been probably the most popular text book for the general study of International Law, namely, Mr. W. E. Hall's Treatise. True, Mr. Hall has devoted considerable space to the consideration of the theories upon which the rules governing civilized nations in their relations with each other rest, while Mr. WALKER in the main contents himself with a description of these rules as they exist. Still, the theoretical discussion of the former is not of such depth and profundity, nor the condensed statements of the latter so limited as to render them separate and distinct classes of work.

The reader, whether he be a student, beginner or a mere searcher after information and instruction upon this subject, as fascinating as it is important to every well read citizen, will certainly find this volume well calculated to supply him with a broad, general view of the science of International Law, and hold his interest throughout. No matter in how condensed a form it may be treated, the study is of necessity largely historical, being closely connected with or growing out of international events, many of which, whether in peace or war, have been the milestones in the progress of modern civilization. Incidentally, with each branch of his subject, Mr. WALKER

gives us in a brief way the instances and cases which gave rise or have reference to the proposition of law applicable thereto. These propositions are stated concisely, and in heavy type precede the more general discussion. The side notes are unusually complete and furnish the ambitious reader with exhaustive references to the more elaborate works of other writers, to historical documents and to reported cases. Of the latter there is a full list accompanying the table of contents. It may be safely said that this work, accompanied by a good collection of cases, such as Cobbett's, cannot fail to accomplish its purpose.

W. S. ELLIS.

THE ROAD RIGHTS AND LIABILITIES OF WHEELMEN. By
GEORGE B. CLEMENTSON of the Wisconsin Bar. Chicago:
Callaghan & Co. 1895.

Now that human beings have discarded their ancient classification by sexes and may be seriously said to consist of (1) those who do and (2) those who do not ride bicycles, it is eminently proper that the enthusiastic members of the wheeling fraternity (and sisterhood) should learn something as to their legal status and appreciate the fact that they have liabilities as well as rights. This good work has been undertaken by the author of this little book, who is, as far as we know, the pioneer of this branch of legal literature, and it cannot be denied that his efforts are deserving of great credit. Mr. CLEMENTSON has not permitted his confessed fondness for the "bike" to bias his sense of fairness or blind his legal acumen. He realizes that the numerous class for whose instruction his work is designed require restraint more than encouragement. He warns them not to disregard the rights of others unless they are prepared to have their own ignored.

When we consider the short time since bicycling has become the craze it now is, and how changed is the condition of things to the driver, rider, or pedestrian, with the swiftly moving machines gliding noiselessly through the crowded thoroughfares of the city, or in battalions along such country roads as are sufficiently well paved for their use, it is not

surprising that those who cling to the more time honored means of progression have found some difficulty in adapting themselves to the new régime, and are inclined to feel that the bicycle is claiming more than it is lawfully entitled to. It is not fair, however, to condemn the whole class for the mistakes of its untrained or over zealous members, and after all it is usually the bicyclist who suffers the damages in accidents on the road.

As Mr. CLEMENTSON shows, the bicycle is a "carriage" (generically termed) and as such has the same right to the use of the public highway (legislative prohibitions excepted) as any other vehicle, and is of course subject to the same restrictions. There is, however, one important practical distinction between the rider of a wheel and the rider or driver of a horse, which, we think, courts should remember, or at least which should be taken into consideration in the trial of any question of conflict between the two, and that is, that while the motions of the former are the result of his own will alone, those of the latter are to some extent dependent upon the tractability of his animal, and its quickness in responding to his wishes.

The question of tolls is one which cannot yet be said to be settled, and of this the author has little to say. On the whole, it is not reasonable, nor consistent with the *carriage* theory, that bicyclists should be exempt from contributing to the maintenance of turnpikes whose smooth surface they so much frequent and on which they expect the same privileges of right of way, etc., as are enjoyed by horsemen; while, on the other hand they cannot be expected to pay the same rates as wagons. It is respectfully suggested that the rule requiring bicycles and saddle horses to pay the same fee be universally adopted.

Mr. CLEMENTSON's book is of the "popular" class of legal publications, being intended primarily for the lay reader. We cannot say too much for the thorough yet concise way in which the subject has been treated, nor for the exceptionally well chosen language with which it is presented to the reader.

W. S. ELLIS.

**THE UNITED STATES INTERNAL REVENUE TAX SYSTEM. EM-
BRACING ALL INTERNAL REVENUE LAWS NOW IN FORCE, AS
AMENDED BY THE LATEST ENACTMENTS. INCLUDING THE
INCOME TAX OF 1894 AND 1864. WITH RULINGS AND
REGULATIONS. By CHARLES WESLEY ELDRIDGE, Member
of the Bar of the Supreme Courts of Massachusetts and
California. Boston and New York: Houghton, Mifflin &
Co. 1895.**

Since the publication of the Revised Statutes, which exhibit the law as it stood December 1, 1873, Congress has passed more than thirty acts, amending and altering in many important particulars, the Internal Revenue laws; but this is the first attempt, since that time, to present these laws in a conveniently digested form for the uses of the profession.

It was Mr. ELDRIDGE, who, with Hon. WILLIAM H. ARMSTRONG of Pennsylvania, made a revision of the Revenue laws in 1871, as a basis for the title in the Revised Statutes, and again, in 1879, for the purposes of the service. Add to this that the editor has had the benefit of twenty-five years active experience of the workings of the system, and that he is a lawyer of learning and ability, and one feels sure that the work is well done,—a conviction which is speedily confirmed by an examination of the pages.

The task of digesting, which is so delicate and so important, but so rarely thoroughly well done, is often rather a thankless task also; but it is with a distinct feeling of gratitude that the reader of this volume will find spread before him the entire body of the revenue laws, precisely as they stand to-day,—seeing at every page the evidence of intelligent and painstaking labor, and knowing that, with the aid of the excellent arrangement, and of the index, he can in a few minutes' time ascertain just what is the law upon any particular point.

And furthermore, there is such an atmosphere of carefulness about the book as inspires, even upon a cursory examination, a confidence in its trustworthiness and accuracy as a tool for the frequently hurried workman.

Comprising, as it does, a history of that part of the scheme

of taxation which, at the present day, yields the Government a full third of its income, from the first act, of March 3, 1791, down to the ill-fated income tax provision of the Wilson Bill; a series of shrewd and cogent comments upon the comparative utility and practicability of the various methods of taxation and the chances of fraudulent evasions thereof, by one who has been behind the scenes; and a very satisfactory and convenient arrangement of the acts, rules of practice, and forms, annotated with the decisions of the courts, and the rulings and regulations of the department,—Mr. ELDRIDGE's book will be of interest alike to the student of economics and the practical legislator, while to the practitioner who has any dealings with the Revenue laws, it can hardly fail to become a *vade mecum*. Altogether, it is a subject for general congratulation that Mr. ELDRIDGE did not adhere to his original project of confining his work to the Income Tax, and thus condemning it to join that long rank of dust-inheriting volumes which had so brief a day of usefulness.

S. D. M.

THE
AMERICAN LAW REGISTER
AND
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PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
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The Supreme Court of Missouri has recently held that two attorneys should be disbarred, when, after the trial of a cause in which they were engaged, one of them falsified the transcript of evidence furnished by the official stenographer, by removing therefrom the correctly transcribed testimony of material witnesses, and substituting false statements that had not been testified to, and delivered the mutilated transcript to the judge as correct, misleading him into signing and approving the same; and the other, knowing such transcript to be false, prepared upon it an abstract, brief, and printed argument, with intent to deceive the appellate court, and get a reversal of the judgment against his client: *State v. Harber*, 31 S. W. Rep. 889. It was also held that such proceedings might be properly instituted in the supreme court, on relation of the attorney general. But in *State v. Mullins*, 31 S. W. Rep. 744, a case growing out of the same transaction, it was held that the senior counsel, who was not shown to have had any connection with the mutilation of the record, would not be disbarred from arguing the appeal from the record as filed.

Attorneys,
Disbarment,
Alteration of
Record

The Circuit Court for the District of South Carolina has declared the registration laws of that state null and void, holding, in *Mills v. Green*, 67 Fed. Rep. 818, (1.) That a suit brought by a citizen of the United States against the supervisor of registration of a state, charged, under the state statutes, with the duty of superintending the registration of voters, to restrain him from carrying out the provisions of such statutes, on the ground that they violate the constitution of the United States, is not a suit against the state; (2.) That the leading purpose in the adoption of the fourteenth and fifteenth amendments to the constitution of the United States was to secure to persons of African descent the full enjoyment of the privileges of citizenship, including the right to vote; and the courts of the United States have jurisdiction of a suit by such a person against officers of a state to restrain them from acting under a statute of that state, claimed to violate the said amendments to the constitution by abridging or denying such privileges; and (3.) That the statutes of South Carolina relating to the registration of voters, one of which, passed in 1882, (Gen. Stat. 1882, § 90, &c.) provided that in 1882 a registration of voters should be made, and the registration books closed; that thereafter such books should be open once a month after the general election in each year, until the first of July preceding each general election, (usually held in November,) for the registration of persons thereafter becoming entitled to vote; that, after the closing of the books in each year, persons coming of age before the election might be registered; and that, upon the registration of any voter, a certificate of registration should be given him, without the production of which he should not be allowed to vote, and which, upon removal from one county to another, must be transferred and renewed under onerous conditions; the other of which statutes, passed in 1894, providing for the election of members of a constitutional convention, also provided that a person not registered in 1882, or at a subsequent time when he would have a right to register, might register within a certain time, upon making affidavit, supported by that of two respectable

Constitutional
Law,
Suits against
State,
Registration
Laws

citizens, as to various particulars of his occupation and residence at the time he might have registered and thereafter:— that these statutes were an unreasonable restriction of the right of suffrage, manifestly designed to prevent the exercise of that right by ignorant persons, especially of the African race, and were a violation both of the constitution of the state and of the fourteenth and fifteenth amendments to the constitution of the United States.

When, in proceedings for contempt in inciting and causing the publication of a criticism of a judge's official action, it appears that the defendant had no agency in the

Contempt
publication, nor knowledge of it, a commitment for contempt is void for want of jurisdiction: *Ex parte Taylor*, (Court of Criminal Appeals of Texas,) 31 S. W. Rep. 641.

The Supreme Court of Illinois has at last wiped out the Whisky Trust, holding, in *Distilling & Cattle-Ferding Co. v.*

**Contracts,
Restraint of
Trade,
Trusts**
People, 41 N. E. Rep. 180, (1.) That a trust combination, organized in order to obtain control of the manufacture and sale of distillery products, by buying up the stock of various distillery companies, and placing it in the hands of trustees, is illegal, because it creates a monopoly; (2.) That when such a trust combination is changed into a corporation, organized, owned and controlled by the trustees of the combination, and all the property controlled by the corporation is transferred to the corporation, the latter is also illegal; and (3.) That a corporation authorized by its charter to engage in the general distilling business in the state of its creation and elsewhere, and to own the property necessary for that purpose, has no right to buy up practically all the distillers in the country, so as to acquire a virtual monopoly of the business.

The Supreme Court of New Jersey has recently held, that when the power to condemn lands, conferred upon a corporation by the act by which it is created, is restricted by a proviso that it shall in no case be authorized to condemn and take possession of the land or property of any other corporation existing under

**Corporations,
Eminent
Domain,
Restrictions**

the laws of the state, (1.) This restriction is not confined to lands of corporations existing at the passage of the act, but applies to those thereafter incorporated; and (2.) Another corporation, which acquires lands after the first corporation had filed a survey thereof according to the requirements of the laws, but before any petition for the appointment of commissioners had been presented, may claim exemption from condemnation under the proviso: *In re American Transp. & Nav. Co.*, 32 Atl. Rep. 74.

According to a recent decision of the Supreme Court of Indiana, in *Thornburg v. American Straw-Board Co.*, 40 N.

Death by
Wrongful
Act.
Parent and
Child.
Bastard

E. Rep. 1062, a man who marries the mother of a bastard child, and receives the child into his home as a member of his family, has no right of action for its death, under a statute, (Rev. Stat. Ind. 1894, § 267.) which provides that a father may

sue for the injury or death of a child.

As a general rule, the mother of an illegitimate child cannot recover damages for his death under the statutes giving a right of action to the relatives or representatives of any one killed through the negligence of another: *Gibson v. Midland Ry. Co.*, 2 Ont. 658; *Hartins v. P. & R. R. Co.*, 15 Phila. (Pa.) 286; S. C., 11 W. N. C. 120. So, under the Missouri statute, (Rev. Stat. Mo. 1889, § 4425,) giving a right of action to recover damages for the death of any one from an injury resulting from or occasioned by negligence, unskilfulness, or criminal intent, and providing that if the deceased be a minor and unmarried, whether such deceased unmarried minor be a natural-born or adopted child, then the father and mother may join in the suit, and each shall have an equal interest in the judgment, it was held by the Circuit Court for the Southern District of Ohio, Western District, that the interest so given extended only to the case of natural-born legitimate children, and that no action could be maintained by a mother for the death of her bastard child: *Marshall v. Wabash R. R. Co.*, 46 Fed. Rep. 269; but the Supreme Court of Missouri, Division No. 1, in *Marshall v. Wabash R. R. Co.*, (Mo.) 25 S.W. Rep. 179, held, that under

this same statute the mother could sue for the wrongful killing of her bastard child, when a minor and unmarried, and that without joining the father of the child as a plaintiff. This decision is rested expressly on the ground that by the statutes of Missouri the want of inheritable blood is removed, on the mother's side ; and this incapacity being removed so far as she is concerned, there seems to be no good reason why a statute which speaks of parents and children should not apply to a mother and her illegitimate child, unless there is something to show that that application was not intended.

Although the Supreme Court of South Carolina, as at present constituted, is unreliable on questions of purely local interest, such as the Dispensary and Registration laws, it nevertheless displays a great deal of acumen on matters of general jurisprudence. It is almost the only court that has refused to be misled by the specious arguments and daring assumptions of the would-be authorities who would have us believe that the marriage state is an eleventh incorporeal hereditament, which escaped the argus eyes of Mr. Blackstone, to be discovered by the microscopic search of Messrs. Bishop, Black and Freeman, who, like the Athenians, are always eager to hear, or to tell, some new thing, as becomes the writers of successful books. In *McCrery v. Davis*, 22 S. E. Rep. 178, the court aforesaid, in a long and able opinion by Judge POPE, discusses the whole question, and arrives at these conclusions ; (1.) That marriage is a civil contract, and not a *res* or *status* ; (2.) That the common law doctrine of divorce prevails in South Carolina ; and (3.) That when a citizen of South Carolina, married in New York to a citizen of that state, resided with his wife in South Carolina, until she left him and went to Illinois, where she obtained a divorce according to the laws of Illinois, without personal service on or appearance of her husband, on a ground of divorce not recognized as cause for divorce in New York or South Carolina, the Illinois judgment is void in South Carolina ; for Art. IV, § 1, of the United States constitution, which provides that full faith and credit shall be given in each state

Divorce,
Conflict of
Laws

to the judicial proceedings of every other state, and the act of Congress, (1 Rev. Stat. U. S. § 905,) which provides that records and proceedings thereof, properly authenticated, shall have such faith and credit given them in every court of the United States as they have in the state whence they may be taken, do not prevent an inquiry into the jurisdiction of the court which renders the judgment.

We may be pardoned for quoting a portion of the argument by which Judge POPE assails, and shatters, the position of those who would hold that marriage creates a *status* between the parties, which, like greenbacks, may be converted into a *res* for the purposes of social economy. "Is it not an assumption coined in order to give a plausible basis to the solution of an otherwise untenable position? Is it not by this means that they hope to give currency to an otherwise baffled policy, namely, to so construct a plan that thereby they may successfully invoke that portion of the federal constitution relating to the effect to be given by all the states to the acts and judgments of one state, and thus force all other states to give effect to judgments for absolute divorces? If marriage were still esteemed a civil contract, they could not hope to escape the defect of jurisdiction hereafter discussed. But by coining this new term '*status*,' and ascribing the efficacy of '*res*' to it, under certain principles hereafter to be referred to, it is deemed by them that the difficulty has been overcome." In short, there is no legal authority for making the condition of marriage a "*status*," or for investing that condition with the properties of an incorporeal hereditament, which a "*res*" must be, if it is anything not tangible; but such is an assumption pure and simple, designed for the easy gratification of the lust of the flesh, and the emolument of those courts which serve other states in the matter of divorce as in marriage affairs Camden once served Pennsylvania, and Gretna Green England. That is, it is an utterly illegal assumption, without a shadow of excuse, except that of the evil it produces. This is also the law of New York, where it is held that the marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize

the court to bind an absent party, a citizen of another state, by substituted service or actual notice given without the jurisdiction of the court where the action is pending; and that therefore a judgment of divorce rendered in another state against a resident of New York, when there has been no personal service of process within the state rendering it, and no personal appearance by the defendant in the action, is void in New York: *Williams v. Williams*, 130 N. Y. 193; S. C., 39 N. E. Rep. 98; *Davis v. Davis*, 22 N. Y. Suppl. 191; S. C., 2 Misc. Rep. 549; and in Pennsylvania, where the same rule obtains: *Lewis v. Lewis*, 6 Kulp (Pa.) 429; *Commonwealth v. Steiger*, 12 Pa. C. C. 334; S. C., 2 D. R. (Pa.) 493; *Commonwealth v. Skuler*, 2 D. R. (Pa.) 552. It is still the rule in England: *Green v. Green*, [1893] Prob. 89.

In the opinion of the Supreme Court of Nebraska, a mortgage given to secure a debt will not be set aside as procured by duress, on the ground that it was given to obtain a dismissal of criminal proceedings instituted by the creditor against the mortgagor, when the mortgage was given without threats or promises having been made to the mortgagor, and after a statement by the creditor's agent that no promise could be made, but, on the contrary, that the prosecution would have to take its course: *Hargreaves v. Menken*, 63 N. W. Rep. 951. See 1 AM. L. REG. & REV. (N. S.) 885.

In *Hanscom v. State*, 31 S. W. Rep. 547, the Court of Civil Appeals of Texas has been called upon to pass upon some of the apparently endless series of disputes as to the validity of ballots under the Australian Ballot Laws. The Revised Statutes of that state, Art. 1694, provide that "All ballots shall be written or printed on plain white paper, without any picture, sign, vignette, device or stamp mark, except the writing or printing in black ink or black pencil of the names of the candidates and the several

Elections.
Ballots.
Validity

offices to be filled, and except the name of the political party whose candidates are on the ticket;" and this was held not to require the rejection of a ballot on which the voter has written his name, nor one on which the election officers have indorsed their initials, nor those on which the names of candidates not voted for are stricken out with a pencil, or on which certain letters or figures are written, or on which the same number is written twice.

The act of Texas of April 12, 1892, p. 18, §§ 26 & 27, provides as follows: "Sec. 26. Not more than one person shall at one time be permitted to occupy any one compartment or place provided for electors to prepare their ballots, except when an elector is unable to prepare his ballot he may [be] accompanied by the two judges to assist him, and no person shall remain in or occupy such compartment longer than may be necessary to prepare his ballot.

Assisting
Voters

"Sec. 27. Any elector who declares to the presiding officer that he cannot read or write, or that by blindness or other physical disability he is unable to prepare his ballot, shall upon request receive the assistance of two of the judges in the preparation thereof."

Under these sections it was held, in the case cited above, (1.) That the fact that such voters are assisted in preparing their ballots by one judge only is no ground for rejecting the ballots, in the absence of fraud, as the statute does not provide for their rejection; (2.) That the fact that a judge of election, who, before his appointment, received money from a candidate, and advocated his cause at the polls, prepared the ballot for a voter in the interest of that candidate, does not invalidate it; and (3.) That when a voter who can read, intending to vote for one person, directs a judge of election to prepare a ballot according to a "guide" given to the judge by the voter, the fact that the vote is afterwards found to be for another will not cause its rejection for fraud, if it does not appear whether it was due to the design of the judge, or to a mistake in the "guide."

According to the Supreme Court of Missouri, the grant to an illuminating company of the right to make and distribute gas, and any substance that might thereafter be used as a substitute therefor, and to lay down any fixtures required therefor, having been made when electric lighting was unknown, does not include the right to adopt any method for distributing electricity for lighting, but that right must be exercised according to the regulations prescribed by law; and, when the power to regulate the use of the streets has been delegated to a municipality before the company adopted electricity for lighting purposes, it must conform to the regulations prescribed by the municipal authorities: *State v. Murphy*, 31 S. W. Rep. 594.

In a recent case in the Supreme Court of Alabama, *Smith v. Smith*, 17 So. Rep. 680, a mortgage had been given by a partnership to the sureties on an administrator's bond, as security for a loan made by the administrator to the firm, and also for the benefit of the heirs. A bill to foreclose the said mortgage, in which the heirs were complainants, and the administrator and his sureties, the firm, the attaching creditors of the firm, and the sheriff, were respondents, alleged that the creditors, proceeding separately, attached the mortgaged property; that part thereof was sold by the sheriff, and the proceeds appropriated by the creditors; and that the sheriff sold a mortgaged lot, and gave a conveyance thereof. The bill prayed for foreclosure, that the administrator account, that the administration be removed into the chancery court, and that the sheriff's deed be canceled. This was held not to be multifarious, nor bad on account of a misjoinder of parties defendant.

The Circuit Court for the District of West Virginia has also lately ruled, in *Ulman v. Jagger*, 67 Fed. Rep. 980, that in a bill and cross-bill for partition between tenants in common of a tract of land, it is proper to join as defendants numerous purchasers of a part of the land at a tax sale, for the purpose of canceling their deeds, on the ground that the tax proceed-

ings were invalid, and such a joinder will not render the bills multifarious.

Wires and insulators, used in forming and completing the connection between an electric light and power plant and the dwellings, stores and other public places supplied by that plant, for the purpose of conveying or transmitting light and heat thereto, are fixtures, within the provisions of the mechanic's lien law: *Hughes v. Lambertville Electric Light, Heat & Power Co.*, (Court of Chancery of New Jersey,) 32 Atl. Rep. 69.

To the same effect is *Badger Lumber Co. v. Marion Water Supply, Electric Light & Power Co.*, 48 Kans. 182; S. C., 29 Pac. Rep. 476; and the same is true of the pipes used by a corporation to convey vapor used for cold storage from its plant to its customers: *Steger v. Arctic Refrigerating Co.*, (Tenn.) 14 S. W. Rep. 1087. See 2 AM. L. REG. & REV. (N. S.), 431.

In *Beard v. United States*, 15 Sup. Ct. Rep. 962, the Supreme Court of the United States has reasserted a very salutary principle of the law of homicide which some courts occasionally seem to forget, viz.: That if the accused does not provoke an assault, and at the time has reasonable ground to believe, and does believe, that his assailant intends to take his life, or to do him great bodily harm, he is not obliged to retreat, nor consider whether he can safely retreat, but is entitled to stand his ground, and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he at the moment honestly believes, and has reasonable grounds to believe, is necessary to save his own life, or to protect himself from great bodily injury.

To substantially the same effect is *Page v. State*, (Supreme Court of Indiana,) 40 N. E. Rep. 745.

The Queen's Bench Division of England has recently decided,

that when a commercial traveler, who traveled for the plaintiffs, went in the course of their business to stay at a certain inn, and while there received certain parcels of goods, sent him by the plaintiffs for sale in the district, the innkeeper had a lien on the goods, on the failure of the traveler to pay for his board and lodging in the inn; although at the time they were received he knew them to be the goods of the plaintiff, and not of the traveler: *Robins & Co. v. Gray*, [1895] 2 Q. B. 78.

The question of knowledge was held to be immaterial in this case, because "the goods in question were of a kind which a commercial traveler would in the ordinary course carry about with him to the inns at which he put up as part of the regular apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while they were there. Here it is true that the goods were not brought by Green to the inn—they were sent to him while he was staying there. But that can make no difference. The defendant was bound to receive them and take care of them as a part of his duty towards his guest. It follows that the lien attached to them."

The Circuit Court of Appeals, Third Circuit, has lately held, in *The London Assurance v. Companhia de Moagens do*

Insurance,
Marine,
Collision

Barreiro, 68 Fed. Rep. 247, affirming 56 Fed. Rep. 44. (1.) That an exception in the words,

"Free of particular average unless the vessel be sunk, burned, stranded, or in collision," ceases to operate as soon as a collision has occurred; and the insurer is liable for subsequent loss, whether the same resulted from the collision or not; and (2.) That there is a "collision," within the meaning of the above exception, when the vessel, after being completely loaded and casting off her moorings, is made fast again to the wharf, because of a difficulty with her engines, and is there run into by a scow, in tow of a tug-boat, which made a substantial break in her bulwarks.

The legislature of South Carolina has received another setback at the hands of the Circuit Court for that district, which

Intoxicating
Liquors,
Dispensary
Law

has recently declared the notorious Dispensary Law of that state, which prohibits citizens of the state from bringing into it, for their own use, alcoholic liquors purchased in other states, and directs the seizure and confiscation of such liquors, but provides for the purchase of such liquors, either in or out of the state, by state officials, and for their sale by such officials, to be unconstitutional, holding, in *Donald v. Scott*, 67 Fed. Rep. 854, where a citizen of South Carolina had purchased in other states, and imported, for his own use, certain alcoholic liquors, which were seized by the state constables, acting under the dispensary law; and then filed a bill in the federal court for an injunction to restrain the constables from continuing their interference with his importation of alcoholic liquors, alleging that the dispensary law was an interference with interstate commerce, and in contravention of the acts of congress relating thereto, (1.) That such a suit is not a suit against the state; (2.) That the suit involved a federal question, and was within the jurisdiction of the courts of the United States; (3.) That so far as the dispensary law prohibited citizens of the state from purchasing alcoholic liquors, for their own use, in other states, and importing them into the state, it was a discrimination against the products of other states and the citizens of such states not patronized by the state officials of South Carolina, and was void as an interference with interstate commerce: and (4.) That it could not be justified as an exercise of the police power.

It is libelous to falsely publish of one that he "would be an anarchist if he thought it would pay," when explained by innuendoes to mean that plaintiff, for a money
 Libel,
 "Anarchist,"
 Innuendoes
 consideration, would engage in the unlawful, treasonable and felonious designs of anarchists, and that an anarchist is a person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society and law and order, and all rights of property: *Lewis v. Daily News Co. of Cumberland*, (Court of Appeals of Maryland,) 32 Atl. Rep. 246.

According to a recent decision of the same court in an action for malicious prosecution, (1.) It is proper to refuse to permit the foreman of the grand jury, who has testified that the criminal prosecution against the plaintiff was dismissed, to state why it was dismissed, as his testimony merely proves that the prosecution is at an end, and has no bearing on the question of probable cause; and (2.) That evidence that the criminal prosecution was dismissed at the instance of the defendant, without the plaintiff's knowledge, is irrelevant, either in bar of the suit, or in mitigation of damages: *Owens v. Owens*, 32 Atl. Rep. 247.

In *Gwilliam v. Twist*, [1895] 2 Q. B. 84, the Court of Appeal of England has reversed the judgment of the Queen's Bench Division, [1895] 1 Q. B. 557. [See 2 AM. L. REG. & REV. (N.S.) 288.] In that case, while the defendants' omnibus was being driven by their servant, a policeman, thinking the driver was drunk, ordered him to discontinue driving. The omnibus was then only a quarter of a mile from the defendants' yard; and the driver and the conductor authorized a person who was standing by to drive the omnibus home. That person, through his negligence in driving, injured the plaintiff; but it was held that, as the defendants might have been communicated with, there was no necessity for their servants to employ another person to drive the omnibus home, and the defendants were not liable for the negligence of the person so employed. It was also queried whether, if there had been such a necessity, the defendants would have been liable.

In *Robb v. Green*, [1895] 2 Q. B. 1, recently decided by the Queen's Bench Division of England, the defendant, while employed by the plaintiff as manager of his business, secretly copied from his master's order-book a list of the names and addresses of his customers, with the intention of using it for the purpose of soliciting orders from them after he had left the

Malicious
Prosecution,
Dismissal of
Prosecution
by Defendant

Master and
Servant,
Employment of
Substitute
by Servant,
Agent
of Necessity

Improper
Use of Infor-
mation
obtained dur-
ing Service,
Liability

plaintiff's service and set up business on his own account. Subsequently, his service with the plaintiff having terminated, he did so use the list; and it was held, on trial without a jury, that it was an implied condition of the contract of service that the defendant would not use, to the detriment of the plaintiff, information to which he had access in the course of the service, and that the defendant was therefore liable in damages for any loss caused to the plaintiff by reason of the breach of that condition.

In *Merryweather v. Moore*, [1892] 2 Ch. 518, the defendant, upon completing a term of apprenticeship with the plaintiffs, a firm of engine-makers, was retained in their employment as a paid clerk, but subsequently left their service for that of another firm of engine-makers. Two days before leaving the plaintiffs' service he compiled for his own purposes, and without their consent, a table of dimensions of various types of engines made by them, and had this table in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine which, it was affirmed on one side and denied on the other, was of dimensions corresponding to dimensions given in the table. On motion for an injunction to restrain the defendant from publishing or communicating the table or its contents to any one, it was held that, in compiling and retaining the table for his own purposes, the defendant had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract arising from that confidence, which is, that a servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information; and that the injunction should be granted. And in *Lamb v. Evans*, [1893] 1 Ch. 218, canvassers, who had been employed by the publisher of a directory, under an agreement which bound them to devote themselves in a particular district exclusively to obtaining from traders advertisements to be inserted in the directory, and to supply the blocks and materials necessary for producing such advertisements, proposed, at the expiration of their agreements, to assist a rival publication in procuring similar advertisements; and it was

held by the Court of Appeal that they were not entitled to use for the purposes of any other publication the materials which, while in the plaintiff's employment, they had obtained for the purpose of his publication.

When the employe has entered into an agreement, prior to entering the service, not to divulge or use any secrets of the business the employer might make known to him, but subsequently leaves the plaintiff's employ and begins the manufacture of similar goods, using the plaintiff's secret processes, he will be restrained from so doing by injunction: *Fralick v. Dispar*, 165 Pa. 24; S. C., 30 Atl. Rep. 521; *Prabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400; S. C., 2 Atl. Rep. 379.

In *State v. Julow*, 31 S. W. Rep. 781, the Supreme Court of Missouri, Division No. 2, has lately rendered a very interesting and valuable decision on one of the most important questions of the day,—that of the right of an employer to prohibit his employes from becoming or remaining members of labor unions.

This right exists at common law, as was ably demonstrated by Judge DALLAS, of the Circuit Court for the Eastern District of Pennsylvania, in *Platt v. Phila. & Reading R. R. Co.*, 65 Fed. Rep. 660; but it has been abrogated by statute in several states. In Missouri, the act of March 6, 1893, P. L. 187, § 1, provides that "no employer . . . shall enter into any contract or agreement with any such employe to withdraw from any trade union, labor union or other lawful organization of which said employe may be a member, or requiring said employe to refrain from joining any trade union, labor union, or other lawful organization, or requiring any such employe to abstain from attending any meeting or assemblage of people called or held for lawful purposes, or shall by any means attempt to compel or coerce any employe into withdrawal from any lawful organization or society;" and § 3 makes a violation of the act punishable by fine and imprisonment. This, in the case mentioned above, was held to be unconstitutional, (1.) Because it is in contravention of the Fifth Amendment to the Constitution of the United States, and Art. 2, § 30, of the

Prohibition
of Member-
ship in
Labor Unions

Constitution of Missouri, providing that no person shall be deprived of life, liberty, or property, without due process of law; (2.) Because it is in violation of section 1 of the Fourteenth Amendment, providing that no state shall "deprive any person of life, liberty, or property, without due process of law; and (3.) Because it is special legislation, forbidden by art. 4, § 53, of the Missouri Constitution, in that "it does not relate to persons or things as a class,—to all workmen, &c.,—but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, &c." The court further goes on to declare that the statute cannot be upheld on the assumption that it is a police regulation. "It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote or tend to promote the public health, welfare, comfort, or safety; and if it did, the state would not be allowed, under the guise and pretense of a police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment."

Similar statutes have been passed in other states. In California, it is enacted by the act of March 14, 1893, c. 149, P. L. 176, (Penal Code Cal. § 679,) that "any person or corporation within this state, or agent or officer on behalf of such person or corporation, who shall hereafter coerce or compel any person or persons to enter into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such person or persons securing employment or continuing in the employment of any such person or corporation, shall be guilty of a misdemeanor." The act of Idaho of March 6, 1893, P. L. 152, provides that "it shall be unlawful for any person, firm or corporation, to make or enter into any agreement, either oral or in writing, by the terms of which any employe of such person, firm or corporation, or any person about to enter the employ of such person, firm or corporation, as a condition for continuing or obtaining such employment, shall promise or agree not to become or continue a member of a labor organization;" and makes a violation of the act a misdemeanor, punishable by fine and imprisonment. The act of

Illinois of June 17, 1893, P. L. 98, enacts that "it shall be unlawful for any individual or member of any firm, or agent, officer or employe of any company or corporation, to prevent, or attempt to prevent, employes from forming, joining and belonging to any lawful labor organization, and any such individual, member, agent, officer, or employe that coerces or attempts to coerce employes by discharging or threatening to discharge [them] from their employ or the employ of any firm, company, or corporation, because of their connection with such lawful labor organization, shall be guilty of a misdemeanor," punishable by fine and imprisonment. By the act of Massachusetts of May 31, 1892, it is provided that "any person or corporation, or agent or officer on behalf of such person or corporation, who shall hereafter coerce or compel any person or persons to enter into an agreement, either written or verbal, not to join or become a member of any labor organization, as a condition of such person or persons securing employment or continuing in the employment of any such person or corporation, shall be punished by a fine of not more than one hundred dollars." And the act of Ohio of April 14, 1892, P. L. 269, is exactly the same as the Illinois statute quoted above, word for word, the latter being evidently a transcript of the former. This Ohio act was held constitutional in *Davis v. State*, 30 Wkly. Law Bull. 342, because the court did not see its way clear to hold it unconstitutional; but all such acts, according to the Missouri case cited above, are unconstitutional.

According to the Supreme Court of Pennsylvania, a stockholder in a corporation, whose votes have been improperly rejected at a corporate election, is a proper party *quo warranto* to institute proceedings of *quo warranto* against officers who claim to have been elected at that election, although, at the same election, he also was elected to an office, his title to which is undisputed: *Commonwealth v. Stevens*, 32 Atl. Rep. 111.

The Exchequer Division of Ireland, in *Boyd v. Great*

Northern Ry. Co., [1895] 2 Ir. R. 555, has recently decided, that when a person, (in this case a physician,) whose time is of pecuniary value, is, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the employees of a railroad company in opening the gates at the crossing, the company will be liable in damages for the delay to the person so detained.

The Court of Errors and Appeals of New Jersey, in *Barber v. West Jersey Title & Guarantee Co.*, 32 Atl. Rep. 222, has reversed the decree of the Court of Chancery, (49 N. J. Eq. 474; S. C., 24 Atl. Rep. 381,) holding, in opposition to the latter court, (1.) That while every person has the right of access to the public records of the county clerk's office, without the payment of any fees to the clerk, to examine any title in which he is interested, subject to reasonable rules and regulations, and a title insurance company has the same right of access to the records when employed to examine and guarantee the title to a particular piece of property, yet such a company has no right to occupy the clerk's office for the purpose of making an abstract of the records, in order to set up and establish a rival business to that of the clerk; and (2.) That as the right of access is thus limited, mandamus to enforce access, not injunction to prevent denial of access, is the proper remedy for a refusal to permit access to the records.

This decision is in decided conflict with the weight of authority: See 31 Am. L. REG. 769; 37 Cent. L. J. 395. The right of examining and abstracting the records, however, must be exercised under suitable regulations. "This right does not permit the register to be unduly annoyed by a large force, or by work at unseasonable hours, or by the monopoly of furniture, office room, or records, to the exclusion of other persons, or with his right to prescribe a reasonable use of the same;" *Day v. Button*, 96 Mich. 600; S. C., 56 N.W. Rep. 3.

The Supreme Court of Minnesota has lately held, in *First*

v. St. Paul City Ry. Co., 63 N. W. Rep. 1099, that the provisions of Chapter 13 of the General Laws of Minnesota of 1887, which enacts that every railroad corporation owning and operating a railroad in that state shall be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant, does not apply to a street-railway corporation, although its line is operated by cable.

When a large amount of rock has been excavated at one point in the course of a sewer, the extra cost of that excavation should not be assessed upon property situate between the rock and the outlet of the sewer, since the removal of the rock confers no benefit upon it: *Vreeland v. Mayor, &c., of City of Bayonne*, (Supreme Court of New Jersey,) 32 Atl. Rep. 68.

Since the acts of a sheriff in seizing, upon a writ of attachment, property of the debtor which is exempt, and refusing to deliver it on demand of the debtor, are, though unlawful, nevertheless done by him under color and by virtue of his office, they constitute a breach of the condition of his bond, and the sureties thereon are liable: *Hursey v. Marty*, (Supreme Court of Minnesota,) 63 N. W. Rep. 1090.

An agreement between two creditors of a common debtor that each will share the loss, if any, which the other sustains on his claim against the debtor, is a "promise to answer for the debt, default or miscarriage of another," within the statute of frauds: *Spear v. Farmers' & Mechanics' Bank*, (Supreme Court of Illinois,) 41 N. E. Rep. 164, affirming 49 Ill. App. 509.

It seems to be the prevailing opinion in the United States, that the mere signing of what purports to be an act of the legislature by the presiding officers of the two houses thereof is of such mighty force and efficacy, as to completely abrogate all other constitutional requirements as to the manner of its passage. One very glaring

ing instance of this *in cortice* tendency was noticed in this department last month, when a statute, which the journals proved conclusively never to have passed, was held valid nevertheless, because signed by the presiding officers of the legislature: *Carr v. Coke*, (N. C.) 22 S. E. Rep. 16; *Wyatt v. Wheeler & Wilson Mfg. Co.* (N. C.) 22 S. E. Rep. 120. [See 2 Am. L. Reg. & Rev. (N. S.) 441.] Now the Supreme Court of Indiana comes to the front with the astounding proposition, that it is not admissible to prove from the journals that an act, duly authenticated and signed by the governor, was in fact passed by the legislature, and sent to him, within the two days next preceding the final adjournment of the legislature, in violation of Art. V, § 14, of the state constitution: *Western Union Tel. Co. v. Taggart*, 40 N. E. Rep. 1050. What makes this decision all the more remarkable is that it does not appear that the signatures of the presiding officers authenticated any other date, so as to make the act clearly valid on its face; and the signature of the governor could not do this, as that was dated within the two days. Therefore, if this decision be correct, the constitutional provision is nugatory, unless the presiding officers, or the governor, refuse to sign an act passed within the time limited—a refusal of which they will never be guilty, if they wish the act passed. And further, it is not to be even suspected that the constitution intended the lodging of such an arbitrary power in the hands of these persons. If these North Carolina and Indiana decisions are correct, constitutional restrictions on the mode of passing statutes are a mere blind, intended to amuse the people; and may be discarded with the greatest ease whenever desired. It is respectfully submitted, that wherever one party is overwhelmingly in power, as in Pennsylvania or Texas, that the bills be simply drawn up in committee, presented to the officers to sign, and to the governor for approval. It will effect a vast saving of time and trouble, and will in no wise invalidate the acts themselves. Of what use is a first, second or third reading, if the want of it cannot be alleged to invalidate the act, when once signed? No imaginary consequences of a step behind the scenes can possibly have the evil consequences of a refusal to

do so ; and the legislative history of to-day shows clearly that these latter evils are now growing with frightful rapidity. It is the duty of the courts to check rather than foster them.

According to a recent decision of the Supreme Court of Louisiana, the importer of shooks or staves already bent so as to form a barrel, of barrel heads ready for insertion, and of hoops ready to be driven, is not to be deemed a manufacturer of a barrel, merely because he substituted machinery for the usual hand labor of setting up the staves in barrel shape, introducing the prepared headings, and driving on the hoops, first subjecting the staves and other material to a heating process ; and the machinery and property thus employed are not exempt from taxation under Article 207 of the constitution of that state: *Brooklyn Cooperage Co. v. City of New Orleans*, 17 So. Rep. 804.

One of the most hopeful signs in the present social crisis is the general willingness of the courts to use the power of the law to curb and punish the effrontery of the labor unions. One of the most important cases in this regard that has come before the courts in late years, equally as important in its own sphere as the Debs Case was in its province, has been recently decided by the Court of Appeal of England. This is the case of *Flood v. Jackson*, [1895] 2 Q. B. 21, in which the broad principles, that an action will lie against a person who maliciously induces a master to discharge a servant from his employment, if injury ensues thereby to the servant, even though the discharge by the master does not constitute a breach of the contract of employment, and that an action will also lie for maliciously inducing a person to abstain from entering into a contract to employ another, if injury ensues to the latter thereby, were applied to members of a labor union who induced an employer to discharge certain of his employes. The plaintiffs were shipwrights, employed by the day, (and consequently liable to discharge at the end of any day,) by a firm of ship repairers,

Trade
Unions,
Liability for
Procuring
Discharge
of Employes

to execute repairs to the woodwork of a ship. Some ironworkers, who were members of a trade union, were employed on the ironwork of the ship, and they objected to working in the same yard with the plaintiffs, upon the ground that the latter had previously worked at ironwork on ships in another yard. The district delegate of the union was called in by the ironworkers, and he informed the employers that all the ironworkers in the society would leave off work unless the plaintiffs were discharged that day, and that the ironworkers would leave off work in any other yard in which the plaintiffs were employed, adding that they were doing their best to stop the practice of shipwrights being employed on ironwork. There was also some evidence that the delegate did this to punish the plaintiffs for their previous conduct in working upon iron. In consequence of that threat the plaintiffs were discharged at the end of the day. They then brought an action against the district delegate, the chairman, and the general secretary of the union, for maliciously, and with intent to injure the plaintiffs, inducing the employers to discharge the plaintiffs, and to refuse to engage them again. The jury found that the district delegate acted maliciously, and that the plaintiffs had been injured thereby, but that the two other defendants did not authorize his acts. It was accordingly held by the Court of Appeal, (1.) That the action was maintainable against the district delegate, although the discharge of the plaintiffs, and the refusal to re-engage them, involved no breach of contract on the part of the employers; but (2.) That the district delegate was not the agent or servant of the members of the union, so as to render each member liable for his acts, and that, therefore, the chairman and general secretary were not, merely by reason of their being members of the union, liable in the action.

It is well settled law that an action will lie on behalf of either employer or employe against a third person who maliciously induces the other party to break his contract, either by persuading the employe to leave his employment, or inducing the employer to discharge the employe, provided that damage results from that breach: *Bowen v. Hall*, 6 Q. B. D. 333; *Chipley v. Atkinson*, 23 Fla. 206; *Walker v. Cronin*,

107 Mass. 555. This has been repeatedly applied to the case of a strike or boycott urged against an employer, or a tradesman. In *Temperton v. Russell*, [1893] 1 Q. B. 715, the defendants were members of a joint committee of three trade unions connected with the building trade in Hull. A firm of builders there refused to obey certain rules laid down by the unions with regard to building operations, and the unions sought to compel them to do so by preventing the supply of building materials to them. In pursuance of this object, they requested the plaintiff, a master mason and builder in Hull, who supplied building materials to the firm, to cease to supply them with such materials, but he refused to comply. Thereupon, with the object of injuring the plaintiff in his business, in order to compel him to comply with their request, the defendants induced persons who, to the knowledge of the defendants, had entered into contracts with the plaintiff for the supply of materials, to break their contracts, and not to enter into further contracts with the plaintiff, by threatening that the workmen would be withdrawn from their employ. The plaintiff sustained damages in consequence of such breaches of contract, and of the refusal of such persons to enter into contracts with him. The Court of Appeal held, that the right of action for maliciously procuring a breach of contract, is not confined to contracts in the nature of contracts for personal service; and that an action was maintainable by the plaintiff against the defendants for maliciously procuring such breaches of contract, and also for maliciously conspiring together to injure him by preventing persons from entering into contracts with him. But there seems to be but one case besides that just decided in England, in which a member of a trade union who procures the discharge of a non-union workman has been held liable to the latter. This is *Lucke v. Clothing Cutters' & Trimmers' Assembly*, No. 7057, 77 Md. 396; S. C., 26 Atl. Rep. 505. In that case the action was brought by the plaintiff against the whole assembly, by order of which his employers were notified to discharge him. He was a faithful, skilful employe, and gave satisfaction to his employers in every way; but owing to the fact that he was a

non-union man, the members of the union objected to his employment, and, in spite of the fact that he applied for admission to the union, that body sent to the firm the following notice, signed by its secretary :

"MESSRS. ROSENFELD BROS. :

GENTLEMEN :—Clothing Cutters and Trimmers L. A. 7507, K. of L., do herewith desire to inform you, that in case the non-union man whom you have in your employ is any longer retained, we will be compelled to notify all labor organizations of the city, that your house is a non-union one."

Upon receiving this notice, the firm immediately notified the plaintiff that he would have to go, and did in fact discharge him, at the same time notifying the assembly of their action. After his discharge the plaintiff had great difficulty in obtaining work, and when, after some months, he secured another position, it was at a smaller salary than he had received before his discharge. It was also proved that the natural result of a failure on the part of his employers to discharge the plaintiff would have been the withdrawal from them of the patronage of the labor unions, and the ordering out of the union labor then employed by them, which would have resulted in great loss. Under these circumstances, the court held (1.) That the interference of the union was in law malicious and unquestionably wrongful; (2.) That the fact that the law authorized the formation of corporations like the defendant did not confer upon them the power to demand the discharge of the plaintiff by the means adopted, the law sanctioning such formation "to promote the well-being of their every-day life, and for mutual assistance in securing the most favorable conditions for the labor of their members and as beneficial societies," (Code Md., Art. 23, § 37,) which certainly does not mean that that promotion is to be secured by making war upon the non-union laboring man, or by any illegal interference with his rights and privileges; and (3.) That the plaintiff was therefore entitled to recover from the union the damages sustained by him in consequence of its actions.

The Court of Criminal Appeals of Texas has recently held, in *Barton v. State*, 31 S. W. Rep. 671, that when the jury, in fixing the term of imprisonment, agree that each juror shall write his verdict on a slip of paper, and that the sum total divided by twelve shall be the term, a new trial will not be granted, if the term as fixed varies from the quotient obtained.

This case follows *Pruitt v. State*, 30 Tex. Cr. Rep. 156; S. C., 16 S. W. Rep. 773, where the same ruling was made in regard to a verdict obtained by first dividing the sum of the juror's opinion as to the length of the term of imprisonment by twelve, which gave five years and seven months, and then compromising on five years. In the case in hand the quotient was three years and ten months, and the term was fixed at four years. But the mere fact that the quotient obtained is not exactly adopted does not seem to afford any good reason for making such cases an exception to the general rule. It is clearly used as a basis for computation, and being illegal itself, ought to vitiate any calculation made upon it.

DEPARTMENT OF INSURANCE.

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WASHBURN MILL CO. v. FIRE ASSOCIATION OF PHILADELPHIA.¹
SUPREME COURT OF MINNESOTA. JANUARY 17, 1895.

Property was insured for the benefit of the mortgagee, as its interest may appear. Previous to such insurance the mortgage was duly foreclosed, the premium was paid by the mortgagee, but the time for redemption did not arrive until after the insurance.

It was *held* by the court that "the non-redemption from the mortgage sale by the owner of the premises did not work an alienation of the property, so as to defeat the policy, but that an action might be maintained in case of loss without notice to the insurance company of such non-redemption, and a notation thereof made on the policy, notwithstanding the policy provided that the mortgagee should notify the company of any change of ownership in the property insured, and that it be so noted on the policy."

EFFECT OF A MORTGAGE CLAUSE IN CONTRACTS OF INSURANCE.

From an early period in the business of insurance, resort has been had in various forms to these contracts as security for all kinds of indebtedness. To effect this class of security it has long been a custom with insurance companies and those dealing with them for the purpose of making their destructible property more valuable and desirable as security, to have a proviso embodied in the policy to this or like effect: "Loss, if any, payable to Richard Roe as his interest—or mortgage interest, as it is sometimes expressed—may appear." This seems to have been the earliest and is yet, perhaps, the most general mode of making a policy payable to one other than the assured for the purpose of security. Sometimes, too, the policy is assigned as collateral security for the same purpose.

¹ Reported in 61 Northwestern, 828.

There are some authorities which hold that where the assured obtains a policy and assigns it absolutely to another, the company consenting, this will operate as a new contract between the company and the assignee; that the assignor thereby becomes a stranger to the contract, and could neither receipt for the policy, prevent a recovery by the assignee, nor do any act which would invalidate the policy as to the assignee: *Pollard v. Insurance Co.*, 42 Me. 226. And in such cases, the action cannot be maintained, as a general rule, in the name of the assignee, but must be brought in the name of the assignor for the use of the assignee: *Flannagin v. Ins. Co.*, 1 Dutch. (N. J.) 506; *Folsom v. Ins. Co.*, 10 Foster, (N. H.) 231; *Pollard v. Ins. Co.*, *supra*; *Conover v. Ins. Co.*, 3 Den. 254; *Coates v. Ins. Co.*, 58 Md. 172. And some of the authorities hold where the owner of the property insured has ceased to have any vested or contingent interest in the insurance, and the policy, by its terms, is made payable to the bearer or to a third person, or is so made payable after its execution by proper indorsement, such third party, bearer or indorsee may bring an action on the contract in his own name, as effectively as though the policy had been originally executed to such third party: *Barrett et al. v. Ins. Co.*, 7 Cuch. (Mass.) 175; *Hand v. Ins. Co.*, 57 N. Y. 41; *Motley v. Ins. Co.*, 29 Me. 337; *Cone v. Ins. Co.* 60 N. Y. 619.

In an early case in New York it was held that where insurance is granted to the owner of the property and payable in whole or in part to a third person, the action must be brought in the name of the originally insured unless he had transferred and conveyed the whole property to such third person, and that such party could not otherwise sue. This ruling was under a statute of New York, however, which provided "That, in case any one insured should sell and assign the subject of insurance, with the consent of the company before the loss, such vendee or assignee might bring an action on the policy in his own name. And when bringing the suit such assignee must not only show that he has an interest in the subject matter but that he has the whole interest." Otherwise he cannot sue—at least, alone: *Conover v. Ins. Co.*, 3 Den. 254.

In another case, in the same State, it was held in an action on a policy payable to a third person, as his interest might appear, that such language imports ownership in such person in the property insured, and that he or his assignee might maintain an action in his own name without joining the assured: *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6. But such words certainly do not import ownership. The interest may be partial and still be an interest. In another case it was held, that though the incumbrancer, to whom the insurance is made payable, may have realized from other securities the whole or a part of his mortgage debt, this will not prevent the incumbrancer from suing on a policy in his own name, nor will the company in such case succeed or be subrogated to the rights of the third party to whom the insurance is made payable. And the company cannot demand or make any inquiry as to the status of the accounts as between the third party and the owner of the property: *Cane v. Ins. Co.*, 60 N. Y. 619.

In an Iowa case where a policy was indorsed, payable to mortgagees as their interest may appear, it was held that the mortgagees could maintain an action on the policy, there being no other mortgagees, and this though the mortgage debt was satisfied before the action was brought, the consideration for the satisfaction of the mortgage, however, being a transfer of the property remaining after the fire, and the assignment of the policy: *Bartlett v. Iowa State Ins. Co.*, 77 Iowa, 86; 41 N. W. 579. But where the property thus undestroyed is transferred for a valuable consideration, with the policy of insurance, the assignee succeeds to all the rights of the assured and a settlement with the assignee for the liability incurred by issuing the policy would be wholly extinguished by making payment or satisfaction to the assignee. There is then no contingency whereby the assured could claim any right of action against the company. His assignment of the policy and transfer of the property covered thereby in payment of the mortgage debt completely extinguishes all his right and interest in the policy. It is held with very good reason in New Hampshire that where the mortgagee, for his protection, takes out a policy payable to himself as his mortgage interest may

appear, and his mortgage debt at the time of the loss is greater than the face of the policy, it is not necessary to make the nominally assured a party: *Hadley v. Ins. Co.*, 55 N. H. 110; *Chamberlain v. Ins. Co.*, 55 N. H. 249. This is reasonable. The interest insured here is not that of the mortgagor. It is taken out and paid for by the mortgagee for his own use and benefit and on property in which, by reason of his mortgage, he has an insurable interest. The mortgagor has no interest, whatever in a policy so issued, and the mortgagee having the sole and exclusive ownership and interest therein, it could serve no purpose to join the mortgagor as a party to an action on the policy. It seems to have been the rule in this State, in comparatively early times, when most of the insurance business was transacted through mutual companies, that the assured, by becoming a member of such company for the purpose of obtaining his insurance (his loss being directed by the terms of the policy to be paid to a designated person), the action must be brought by the assured, and cannot be maintained by such third party alone: *Nevins v. Ins. Co.*, 25 N. H. 22; *Rollins v. Ins. Co.*, 25 N. H. 200; *Folsom v. Ins. Co.*, 30 N. H. 231; *Blanchard v. Ins. Co.*, 33 N. H. 9; *Pierce v. Ins. Co.*, 50 N. H. 297. And in Illinois a comparatively early case announces the doctrine that where a policy is assigned by the insured, with the consent of the company, the assignee may sue on the policy for his own use in the name of the assured, but he cannot alone maintain the action. In this case, too, the policy was issued directly to the mortgagee, was for his exclusive benefit, and it was his interest only that was protected. A similar doctrine was laid down in Maryland where a policy was taken out on property which, at the time, was expressly made payable to the mortgagee by its terms, and which insured only the interest of such mortgagee. It was held that the policy, which by its terms insured one party but made the loss payable to another, would be construed in law as having been at its inception assigned to such third party with the consent of the company, and he is entitled to its benefits without procuring a transfer from the assured to the mortgagee with the consent of the company. Nor will the

fact that the mortgagor disposes of all his interest in the insured property prior to the bringing of the action by the mortgagee prevent the mortgagee from maintaining the action: *National Fire Ins. Co. v. Crane*, 16 Md. 260. In *Hammel v. The Queens Ins. Co.*, 50 Wis. 240; 6 N. W. 805, it is held that where a policy is made payable to the mortgagee as his interest shall appear, and if the debt due from the mortgagor exceed the face of the policy the legal title to the policy is in the mortgagee, and he can maintain an action thereon alone. This ruling was made by a divided court, ORTON, J., in a vigorous dissenting opinion stoutly maintaining that the mortgagor was a necessary party. The doctrine of this case finds support in *Travellers Ins. Co. v. California Ins. Co.*, 1 N. D. 151; 45 N. W. 703; *West Coast Lumber Co. v. Ins. Co.*, 98 Cal. 502; 33 Pac. 258. Ordinarily, however, where the insurance is issued on the application of the insured, and made payable to a third person by indorsement for the purpose of securing a debt, it is absolutely necessary that all who have an interest in the policy, vested or contingent, be made parties, either plaintiff or defendant, to the end that all rights thereunder may be adjudicated in one action, and that the company may not be unnecessarily harassed by two suits on a single contract. Let us suppose that A owes B \$500. A takes out a policy of insurance on his property for \$1000. For the better protection of his creditor, he has an indorsement placed on it making the loss, if any, payable to B as his mortgage interest may appear. The interest of B is clearly only five hundred dollars. A, too, has an actual interest in the same policy. A loss occurs, however, and B brings the action alone and in his own name. We will suppose that the whole of his debt is unpaid. Now, what is the effect of a recovery by B alone on this policy to the extent of his \$500? What is the effect if the insurance company is compelled to pay such a judgment? What would be the further effect if A should, after the recovery of the judgment and money by B, pay B off, which in duty he is bound to do. B then has no interest in the policy, though he has recovered his \$500. He may be held a trustee, for A, perhaps, but what if he

squanders the money? A is not responsible to the company for B's conduct. He has the right to pay B at any time, and the very instant he does so, his right of action becomes entire and indivisible, and he has a just right to proceed against the company for the full face of his policy if he has complied with all its terms which he may, and is presumed, to have done. Of course the result might be the same if A owed B \$1500 instead of only \$500, according to some of the cases—only a very few, however,—if the face of the policy does not exceed the amount of the debt, the mortgagee may sue alone. Of course he can recover the whole amount of his debt when the amount of the policy is less than his debt, just as well as he could recover half of it if the face of the policy were double the debt. When the mortgage debt is paid, that, *ipso facto*, extinguishes every right of the mortgagee in the policy, he can thereafter bring no action on it, but the assured can bring it alone just as though there had never been any mortgage indorsement contained in the policy. Again, let us suppose that A takes out a policy on his house for \$1000. He also borrows \$1000 from B, and in order to secure B, he has the policy made payable to B as his mortgage interest may appear. A now really has his insurance money to start with. He may be little concerned in keeping the terms of the policy. If his house burns, he is not at any loss, for he knows B can sue on the policy and recover the full \$1000. Suppose A then destroys his own house? If B can maintain the action, as some of the cases hold, the law will have permitted A to profit by his own infamy, and will allow B to recover on a policy issued to A, and insuring his property after A, according to the very terms of the contract under which B claims, and through whom he must receive any right to recover at all, has forfeited all right of recovery whatever. These illustrations have been resorted to show the dangers to which the rulings of some of the courts might lead, and the manifest injustice that might follow. And they further demonstrate the importance of the rule which permits the assignee or mortgagee to recover only when the assured or mortgagor himself could do so; and

that all who have an interest in the subject matter of the action should be made parties, to the end that all rights, arising under a single contract, might be adjudicated in a single action.

That an action on a policy where it is payable to a third person as mortgagee cannot be split up into two actions, and the company thereby subjected to two suits on one policy, is fortified not only by the better reasoning, but by most respectable authority as well: *Carberry v. Ins. Co.*, 86 Wis. 323, 56 N. W. 920; *Hartford Ins. Co. v. Davenport*, 37 Mich. 613; *Shore v. Shore*, 69 Wis. 425; 34 N. W. 392; *Thatch v. Ins. Co.*, 11 Fed. 29. See, also, *Norwich Union Ins. Soc. v. Standard Oil Co.*, 59 Fed. 984.

It is held in Illinois that when the insurance is effected by the mortgagor he holds the legal title, and may maintain an action on the policy for the use of the mortgagee: *Ill. Fire Ins. Co. v. Stanton*, 57 Ill. 354. This is especially true at common law under which the assignee of any chose in action cannot sue to enforce the rights assigned, in his own name, but must bring the action in the name of his assignor. This rule applies to that class of cases in which the policies are made payable in whole or in part to third persons, either by the terms of the policy itself, or by the assignment of the interest of the originally insured to another: *New England Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Flannigan v. Ins. Co.*, 1 Dutch. (N. J.) 506; *Folsom v. Ins. Co.*, 10 Foster, (N. H.), 251; *Pollard v. Ins. Co.*, 42 Me. 221; *Conover v. Ins. Co.*, 3 Den. 254; *Jessel v. Ins. Co.*, 3 Hill, 88; *Bowditch v. Ins. Co.*, 3 Gray (Mass.) 415; *Coates v. Ins. Co.*, 58 Md. 172.

It was held in *Wynne v. Niagara Fire Ins. Co.*, 91 N. Y. 185, that where a policy is payable to a third person as interest may appear, the owner of the property and mortgagee may well be joined as parties plaintiff in an action under the policy; that such mortgagee and insured have no adverse interest in the subject matter of an action, but, on the contrary, have a common interest in enforcing the contract; that the fund realized is applicable first, to the payment of the mortgage debt, and, if any remain, to the assured. To the same effect is the case of *Baynton v. Ins. Co.*, 16 Barb. 224, where it is further held that

where the assured, after assigning his policy as collateral, violates some of the provisions of the policy, there can be no recovery beyond the debt so secured, through both mortgagee and assured are proper parties plaintiff.

Upon the issuance of a policy of insurance, loss, if any, payable to the mortgagee, as his interest may appear, some of the courts hold that the legal title is vested in the mortgagee by the terms of the mortgage itself: *Hammell v. Queens Ins. Co.*, 50 Wis. 240; 6 N. W. 805; *Travellers Ins. Co. v. California Ins. Co.*, 1 N. D. 151; 45 N. W. 703; *The Appleton Iron Co. v. Assur. Co.*, 46 Wis. 23; 1 N. W. 9. This being the case, the mortgagee could at least sue in his own name for the amount due him from the mortgagor, and could control any judgment that might be recovered to the extent of his interest. But while it may be conceded, for the sake of argument, that such a stipulation in a policy has this effect, yet the fact remains that this is only a contingent assignment of such legal title, and, upon the payment by the mortgagor to the mortgagee of the full debt thus secured, the title of the former in the policy revives and becomes paramount and exclusive. The clause does not effect an assignment of the policy either in whole or in part: *Martin v. Ins. Co.*, 9 Vr. 140; *Loring v. Ins. Co.*, 8 Gray (Mass.), 28. The contract of insurance is with the owner; it is to protect his property and not that of his mortgagee, and a loss under such policy is a loss to the assured, notwithstanding the mortgage clause, though the mortgagee has certain rights which the courts will protect: *Franklin Savings Institution v. Ins. Co.*, 119 Mass. 240; *Fogg v. Ins. Co.*, 10 Cush. (Mass.), 337; *Hale v. Ins. Co.*, 6 Gray (Mass.), 169. And the mortgagor will not be permitted to settle with the company and thereby exclude the rights of the mortgagee. His interest in the policy can still be enforced, though the assured may execute for a full consideration, a complete acquittance to the company: *Hathaway v. Ins. Co.*, 134 N. Y. 439; 32 N. E. 40.

In a case where the owner of property, upon which he had obtained a policy of insurance, subsequently mortgaged the same to secure a debt, and assigned the policy as collateral to

further secure the same, and upon the property being destroyed, the mortgagor instituted an action on the policy for the use of the assignee of the policy, the question arose in the case as to what effect a violation of any of the terms of the policy by the assured would have on the right of the mortgagee and assignee to recover. The opinion in the case shows great research and learning and is supported by the most unanswerable reasoning. The court reviews a number of cases on the subject and pays especial attention to that of *Traders' Ins. Co. v. Robert*, 17 Wend. 631, as well as other cases of the same tenor. The ruling of the lower court presented this question: "whether, where a policy of insurance has been assigned by the insured to one holding a mortgage on the premises, with the consent of the company indorsed upon the policy, its validity can be destroyed by acts done by the assignor in violation of its conditions." The court further says: "This question has received much discussion in the courts of New York and the decisions first made have been deliberately overruled. It was first held in *Traders' Ins. Co. v. Robert*, 9 Wend. 404, that no act of the assured, after the assignment of the policy, with the consent of the company, can impair the rights of the assignee. This case was approved and followed in *Tillon v. Ins. Co.*, 1 Seld. 406, the court holding that the assignment of the policy, with the assent of the insurer, creates new and mutual relations and rights between the assignee and the insurer, which cannot be impaired by a third person over whom the assignee had no control. The question again came up in *Grosvenor v. Ins. Co.*, 17 N. Y. 392, and in *Buffalo Steam Engine Works v. Ins. Co.*, Id. 401. In the first case the policy was not assigned by the mortgagor to the mortgagee, but by its original terms the loss, in case of fire was made payable to the mortgagee. The majority of the court held the cause was not distinguished from an assignment of the policy, and, overruling the cases already cited, held the policy was avoided by certain acts done by the mortgagor in violation of the terms of the policy. . . . In these two cases the question involved received a much fuller discussion than was given to it when the former decisions were rendered. In reply to the argument of the court in 9 Wend.

that the assignor could not be permitted to execute a release to the insurance company which would impair the rights of the assignee, and that he should not be permitted to do indirectly what he could not do directly, the court very justly says: 'This argument fails to distinguish between acts done for the purpose of discharging a liability and acts which, by the terms of the contract were necessary to be done or omitted in order to continue the liability of the company in force.' "

The Robert case also received a stunning blow at the hands of the Supreme Court of Pennsylvania in *State Mutual Fire Ins. Co. v. Roberts*, 31 Pa. 438, wherein STRONG, J., delivering the opinion of the court, among other things, said: "I am aware that there are to be found in the decisions of two courts of our sister States, adjudications that such assignments—assignments of the policy with the consent of the company—are equivalent to new policies issued to the assignees. Of course it is meant to refer to those cases where the assignee has an insurable interest, for, as the contract is one of indemnity, where there is no interest there can be no loss. The cases are. *Traders Ins. Co. v. Robert*, 9 Wend. 404; *Tillon v. Ins. Co.*, 1 Seld. 405, and *Charleston Ins. Co. v. Nye*, 2 McMul. (S. C.) 237. Both the latter were decided on the authority of the former. That was an action in the Supreme Court of New York, and so far as it relates to the doctrine now under discussion, has never been reviewed in the Court of Appeals. There a mortgagor, having effected an insurance on the mortgaged property, assigned his policy to the mortgagee with the assent of the insurers. It contained a condition against other insurance similar to that. After the assignment he effected other insurance upon the same property. It was held that though the assignee was compelled to sue in the name of the originally insured, yet the subsequent insurance did not affect his right to recover. He was treated as if the policy had been issued to protect his interest as mortgagee. It must be admitted that this case is in entire accordance with the ruling of the lower court in the case now before us. It was followed in New York by *Tillon v. Ins. Co.*, 1 Seld. 405, which was decided on its authority alone without any examination of the

correctness of the principle asserted in it. The South Carolina case was also decided with the Robert case in view, and in part rests upon it." The court then proceeds to note that these cases are exploded by the case of *Gratvick v. Ins. Co.*, 17 N. Y. 391, and fully approves the reasoning of the court in that case. That this doctrine is correct and that the assignee of the policy succeeds to only the rights which the assignor might assign, finds support in *Carpenter v. Ins. Co.*, 16 Pet. 405, and *Weed v. Ins. Co.*, 116 N. Y. 120; 22 N. E. 229. In the latter case the policy was taken out on property, alleged to belong to the estate of a deceased person, and was made payable to a mortgagee and creditor of the estate as his interest might appear. The policy contained a provision that if the ownership of the assured was other than the sole and unconditional ownership it should be void. It turned out that the estate insured did not own the property, and it was held that the mortgagee acquired no rights by the indorsement.

It is certainly true, ordinarily, that where insurance is effected and afterward the assured disposed of the insured property, assigns the same to his vendee, the vendee taking the absolute dominion and ownership over the property covered, and the company consenting to such sale and assignment of the property and the policy, that thereafter no act of the originally insured can effect or in any way impair any rights whatever obtained by the assignee and vendee by reason of such transfer and assignment of the policy and property insured. For, in such cases the assured loses all control over and right to, or title in, the protected property. He becomes to both the company and the assignee a stranger and a third party, and could no more destroy or impair the subsequently vested rights of the assignee by setting fire to the property, or otherwise violating any of the stipulations or conditions of the policy than any other stranger in interest under the policy. After such assignment and sale there is no duty resting on the originally insured to any one. His rights are gone and in no event could he recover on the policy in whole or in part. The assignee becomes absolutely and for all purposes substituted to all the rights of the insured, and the assured will have no

greater rights in either the policy or property covered than the assignee had before such sale and assignment. Thereafter, the assignee and not the assignor, will be held to a compliance with the terms of the policy. He could not destroy the property himself or violate any of its conditions, simply because he derives his rights through another party on whom was enjoined the duty of keeping sacred the terms of the contract. Any other rule would be in defiance of justice and would merit and receive unqualified condemnation.

On the other hand, the general rule as established by the great weight of authority and what seems to be much the better reason, is that where the insurance is taken by the mortgagor, and the policy stipulates that the loss, if any, shall be payable to a third person as his interest may appear, or that where the policy is assigned or transferred by the mortgagor as collateral security, any violation of the terms of the policy by the insured, though without the knowledge or consent of the mortgagee, will avoid the policy and defeat a recovery by the latter: *Gillet v. Ins. Co.*, 73 Wis. 203; 41 N. W. 78; *Ins. Co. v. Hullman*, 92 Ill. 145; *Grosvenor v. Ins. Co.*, 17 N. Y. 391; *Bidwell v. Ins. Co.*, 19 N. Y. 179; *Hale v. Ins. Co.*, 6 Gray (Mass.), 169; *Perry v. Ins. Co.*, 61 N. Y. 214; *Weed v. Ins. Co.*, 116 N. Y. 106; 22 N. E. 229; *Pupke v. Ins. Co.*, 17 Wis. 389; *State Mutual Ins. Co. v. Roberts*, 31 Pa. St. 438; *Minoch v. Ins. Co.*, 90 Mich. 236; 51 N. W. 367; *Phanix Ins. Co. v. Willis*, 70 Tex. 12; 6 S. W. 825; *Carberry Ins. Co. (Wis.)*, 56 N. W. 920; *Baynton v. Ins. Co.*, 16 Barb. 24; *Ins. Co. v. Stanton*, 57 Ill. 354; *Ins. Co. v. Hauslien*, 60 Ill. 521; *Ins. Co. v. Fix*, 53 Ill. 151; *Ins. Co. v. Davenport*, 37 Mich. 609; *Van Buren v. Ins. Co.*, 28 Mich. 404; *Ins. Co. v. Huron Salt & Lumber Co.*, 31 Mich. 346.

Where the insurance is thus made payable to a third party it is nevertheless the interest of the insured that is protected. The contract is with the assured, and the company agrees to pay him, or any other person designated, to receive the face of the policy in whole or in part. But if the assured fails or neglects to furnish proofs of loss, brings or has the action brought within the time stipulated in the policy; if he increases

the hazard contrary to the terms of the policy, makes such false statements in the application or is guilty of any fraud or bad faith in procuring the insurance; fails to give notice of the destruction of the property; contracts for additional insurance when forbidden by the policy to do so, or in any manner fails to perform and keep inviolate the contract on his part required by the policy to be kept, he cannot recover; and, as his assignee succeeds only to such rights as the assured had, his rights must fall with those originally injured. This is reasonable. If the assignee could recover regardless of what the assured might do in violation of the contract, it is clear that the company would be required in a sense to insure against a double or at least an increased hazard, whereas by the terms of the policy the company only undertakes to insure against a certain defined hazard, and receives pay only for what is thus expressed. That the companies could not do a profitable business if they were subjected to such consequences is clear, and the natural result would be bankruptcy or insolvency, and their very existence would soon be a thing of the past unless they should increase their rate of premiums sufficiently to meet this extra and unintended risk. Again, how would they increase their tariff of premium rates? It would be inequitable to make those patrons who do not mortgage the insured property and assign the policy as collateral, or have it made payable to a mortgagee, to pay the same rate of insurance exacted for the greater hazard. And how are the companies to know when the policy holder will assign his chose in action? This is impossible and the underwriter's only safe course would be to charge every one a rate of premium which would be commensurate with the greater hazard. This is clearly wrong. And to illustrate the force of this contention we will suppose that A takes out a policy of insurance for \$1000. The property, perhaps, is not worth more than this sum. He owes B \$1000 and transfers the policy to him as collateral to secure it. He also owes C \$1000 and executes to C a mortgage on the insured premises to secure this \$1000 after the transaction with B. He makes default with C and the latter forecloses the mortgage and sells the property, completely divests A of

his title in the insured property, and makes his mortgage debt by the foreclosure. After the foreclosure and during the life of the policy, the property is destroyed by fire. B now resorts to his policy and compels the insurance company to pay his \$1000. A has practically sold the property before the fire, yet he gets the full benefit of the insurance, and the obliging company is compelled to pay A's debt to B for him. It might be answered to this that the company would be subrogated to B's right to collect his \$1000 by being compelled in law to pay the same. But suppose the property insured is all that A had, or is exempt under the laws of the state in which he lives? Would this place the company in any better attitude? It may be that A destroyed the house himself after the mortgage foreclosure for the very purpose of requiring the company to pay his debt to B; and according to that line of cases which hold that no act of the originally insured can affect the rights of the assignee, or the party to whom the policy is made payable for the purpose of securing a debt. It is patent that a large per centum of such losses as this would be ruinous to any company. It would be impossible for it to do business in the face of such odds for any great length of time, and the eve of prophecy would behold in unerring certainty its early downfall and ruin. It is clear, therefore that the better reason as well as natural justice is with that line of decisions which hold that when a policy is taken out by the assured, and made payable to a third party, as his interest may appear, or is by the assured assigned, either absolutely or as collateral, such third party or mortgagee, assignee, or other party in interest, can only recover where the assured could have done so had the policy not been assigned or in any manner transferred.

It is true that this rule will not obtain, perhaps, where the mortgagee—who, of course, has an insurable interest in his mortgagor's property—should for his own protection, procure a policy of insurance on the mortgaged property. In this case, of course, the insurance contract is with the mortgagee. The mortgagor has no interest therein whatever. Neither his property nor any interest of his is covered by the policy. He

did not apply for the insurance, did not pay the premium and no policy was issued or made payable to him, and no act of his—not even the willful destruction of his property by him—could preclude the right of recovery in the mortgagee. In cases of this kind there is nothing to revert to the mortgagor. He may pay his debt, and this will only have the effect of practically cancelling the insurance, for the mortgagee has an insurable interest in the property by reason of his debt secured by his mortgage. When that is satisfied, he has nothing to insure, and he can suffer no loss by the destruction of the property. Not so, however, where the policy is issued to the mortgagor and made payable to the mortgagee as his mortgage interest may appear. When this is the case it is plain that the payment of the secured debt would have the effect of vesting the full right to all the insurance in the mortgagor, for, the interest of the mortgagee being extinguished, his right in the policy ceases as it was only contingent on the existence of his debt. When that was extinguished the mortgage interest in the policy and the property covered *ipso facto* ceased and became extinguished. The insured thereby becomes entitled to recover on the policy just as though there had been no mortgage transaction whatever. In harmony with this rule it is held by many courts of the highest respectability that the effect of the clause making the policy payable to a third party as mortgagee, etc., is but a direction in advance of any loss to pay the money, when due, to a designated party; which payment, when so made by the company, discharges its liability to the extent of the interest of such third person in the policy, the assured, of course, being entitled to anything that may remain: *Martin v. Franklin Ins. Co.*, 9 Vr. 140; *Turner v. Ins. Co.*, 109 Mass. 573; *Fogg v. Ins. Co.*, 10 Cush. (Mass.) 346; *Loring v. Ins. Co.*, 8 Gray (Mass.) 29; *Hale v. Ins. Co.*, 6 Gray (Mass.) 169; *Franklin Savings Institution v. Ins. Co.*, 119 Mass. 240.

There has come into use, of late years, however, a mortgage clause very different from any that has been considered. It seems designed to avoid the consequences of some of the decisions under the simple mortgage clauses, on the one hand,

and to the better and more definitely set out the rights and liabilities of the parties, on the other. It is as follows: "Loss, if any, payable to A. B., mortgagee or trustee as hereinafter provided. It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only herein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy; provided, that in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then, on demand, the mortgagee or trustee shall pay the same; provided, also, that the mortgagee or trustee shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have permission for such change of ownership or increase of hazard duly indorsed on said policy; and, provided, further, that every increase of hazard not permitted by the policy to the mortgagor shall be paid for by the mortgagee or trustee on reasonable demand, and after demand made by this company, upon and refusal by the mortgagor or owner to pay according to the established schedule of rates. It is, however, understood that this company reserves the right to cancel this policy as stipulated in the printed conditions in said policy; and, also, to cancel this agreement on giving ten days' notice of their intention to the trustee or mortgagee named therein, and from and after the expiration of the said ten days this agreement shall be null and void. It is further agreed that in case of any other insurance upon the property hereby insured, then this company shall not be liable under this policy for a greater portion of any loss sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein. It is also agreed that whenever this company shall pay the mortgage or trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor exists it shall, at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payments shall be

made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or, said company may, at its option, pay said mortgagee or trustee the whole debt so secured with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by such parties for the payment thereof." The reports do not amount in decisions and precedents under these comprehensive mortgage clauses, but the few cases hold, iron-clad as these mortgage clauses are, that they do not dispense with the requirements of the policy except to the extent only that they are not required by the express provisions of the mortgage clause: *Hastings v. Ins. Co.*, 73 N. Y. 141; *American Building & Loan Association v. Farmers' Ins. Co.*, (Wash.) 40 Pac. 125. In the latter case, the court explaining the effect of such a mortgage clause, among other things, says: "All the provisions of the policy continued in force, excepting only such as are inconsistent with the provisions contained in the clause annexed; but general provisions of the policy intended for the security and protection of the company, and which do not relate personally to the mortgagor, such as the stipulation concerning the time in which the action shall be brought, are not abrogated or affected by it. Resort must still be had to the terms of the policy to ascertain many things which are the very life of the contract; among others, the amount of insurance, the property insured, the term of the insurance, and very many matters concerning which the indorsement itself furnishes absolutely no information whatever." This is all well said. For, suppose the term of the policy has lapsed or expired? A recovery could not be had thereafter on the policy simply, forsooth, because the mortgage clause had been attached. Likewise the stipulation that the action on the policy must be commenced within the period named in the policy notwithstanding such mortgage clause; *American Building & Loan Assn. v. Farmers' Ins. Co.*, *supra*. And where an action is

brought by the mortgagee on a policy containing such a stipulation, not even the wilful or wanton destruction of the property by the assured will defeat the right of the mortgagee to the extent of his mortgage interest, to recover; *Hartford Fire Insurance Co. v. Williams*, 63 Fed. 925. Such an act, it is true, is a fraud upon the company so far as the assured is concerned, and should he, after such destruction of the property by himself, pay off and extinguish the mortgage debt, the mortgagee's interest in the policy being thereby terminated and ended, no recovery could be had on the policy at all. All rights of the assured being defeated by his own act, the policy becomes absolutely of no force. But if the mortgagee should, before such payment of the debt to him by the assured, first collect the amount of his mortgage interest from the insurance company, the company, upon the payment of the mortgage debt by the assured to the mortgagee, would doubtless have its right of action against the mortgagee for such sums as it may have paid him under the mortgage clause.

While this mortgage clause stipulates that the policy, as to the interest of the mortgagee "shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.," this clause must nevertheless yield to another clause in the policy which provides that the insurer "shall not be liable under this policy for a greater portion of any loss than the sum thereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein." In such case the mortgagee will be required to prorate the insurance covered, as it were, by his mortgage clause, with any other insurance which the mortgagor or any other person having an insurable interest in the insured property, who may have also taken out on the same property: *Hartford Fire Ins. Co. v. Williams*, *supra*.

Such a mortgage clause has the effect of making a separate contract of insurance with the mortgagee to the extent of the mortgage interest: *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446; 29 Pac. Rep. 682; *Phoenix Ins. Co. v. Omaha Land & Trust Co.* (Neb.), 60 N. W. 133; *City Fire Cent*

Savings Bank v. Ins. Co., 122 Mass. 165; *Ins. Co. v. Olcott*, 87 Ill. 439. And the clause must be construed with all the provisions of the policy, and not alone when there is any doubt as to its effect: *Hartford Fire Ins. Co. v. Williams*, *supra*; *Merriden Savings Bank v. Ins. Co.*, 50 Conn. 396. And the clause does not partake of the nature of an assignment of the interest of the insured, in whole or in part, to the mortgagee: *Phoenix Ins. Co. v. Omaha Land and Trust Co.*, *supra*, and in this case it is further held that the failure of the assured to give written notice of loss under the policy, as provided by its terms, will not defeat the right of the mortgagee to recover, and the mortgagee may maintain an action on the policy in his own name and alone for the amount of his mortgage debt, especially if no objection is made in the trial court to the want of proper parties: See also *Merriden Savings Bank v. Ins. Co.*, *supra*. But, on principle, whether it be necessary for the insured to give the written notice of loss or not, it would certainly be well for the mortgagee to do so if in his power. And the mortgagee should, doubtless, use every effort to have the assured make the proofs of loss required by the policy, and, if it is in the power of the mortgagee to fulfil this requirement, he should, out of abundance of caution, if for no other reason, make the necessary proofs himself, though if it be out of his power to do so, and the assured refuses, the mortgagee could still, no doubt, recover by virtue of the mortgage clause. But the law certainly enjoins upon him the duty of exercising at least ordinary diligence and the utmost good faith.

These comprehensive and binding mortgage clauses seem to have been necessitated from a demand on the part of mortgagees for better security for their debts than the simple and short clause making the insurance payable to a third as his interest might appear, or an assignment of the policy as originally written as collateral security. In all their details they have not been passed upon by the courts, and it is noticeable that the decisions afford but little light except as to some portions of the clause which have received judicial consideration. These lengthy clauses are not all exactly alike, some

going much more into detail than others. It is apparent, however, that they all have in view one of the very controlling ideas that the insured cannot, by any act of his own, defeat a recovery by the mortgagee to the extent of his mortgage debt. Certain duties are also devolved upon the mortgagee, such as giving notice of increased hazard, change of occupation, etc., when the same may become known to him, and he is required to pay the necessary additional premium for any increased hazard according to the usual tariff of rates for such, and the company, upon certain notice, for its protection, reserves the right to cancel the policy even as to the mortgagee. Nor can the mortgagee recover for his debt simply by declaring on the policy as it is written with the mortgage clause. It must affirmatively appear that he has a valid debt secured, that it is unpaid, and what the amount is. In short, he must show his interest in the policy, else his complaint will be vulnerable to demurer: *Commercial Union Assur. Co. v. Dunbar* (Tex. Civ. App.), 26 S. W. 628.

Out of the somewhat confused and contradictory state of the decisions, it is fairly safe to lay down the following general rules as sustained by the better reason and authority :

1. Where the loss is simply made payable to the mortgagee as his interest may appear, it is but a stipulation for the payment of the mortgage debt to such third party, and the third party can recover nothing under the policy where the assured himself could not do so. The mortgagee can in no event succeed to a greater or paramount right than that possessed by him from whom he receives the right to collect for his mortgage debt, the insurance being taken out on the property, and at the instance of the assured and paid for by him.

2. Where the insurance is taken out by the mortgagee, for his own benefit, though the policy is written in the name of the nominally insured, and made payable to the mortgagee as his mortgage interest may appear, the mortgagee will be entitled to bring the action in his own name to the extent of his debt so long as any part thereof is in existence, and the assured can do nothing to defeat the terms and provisions of the policy.

3. Where the insurance is primarily taken by the assured and the policy contains the provision making it payable to a third party as his interest may appear, the action on the policy must be brought in the name of the insured for the use of the mortgagee, as a general rule, and if the face of the policy exceeds the amount of the debt secured, the action cannot be maintained by the mortgagee alone, but the assured must be joined as a party.

4. Where, instead of making the loss payable to the mortgagee by the terms of the policy, it is assigned to him as collateral security, the suit at common law must be brought in the name of the assignor, and the right of the assignee to recover will depend on the right of the assured to have recovered if there had been no assignment of the cause of action.

5. Where the policy contains the iron-clad mortgage clause, the mortgagee may sue in his own name for that part of the insurance which secures his mortgage debt, and no more.

6. The mortgagee, before he will be entitled to recover at all, must show a subsisting debt secured by the policy or the mortgage clause before he will be permitted to recover anything in any event. And he must do and perform in good faith all things on his part to be performed under the policy and the mortgage clause, which should be construed together, and he is bound by all the terms and conditions of the policy not in irreconcilable conflict with the mortgage clause.

7. No act of the assured, such as the wilful destruction of the insured property, or failure to comply with any of the conditions of the policy required to be performed by the insured, will defeat an action by the mortgagee on a policy containing the iron-clad clause.

W. C. RODGERS.

Nashville, Ark., July, 1895.

A FEW OBSERVATIONS ON LAW AND SOVEREIGNTY, BEING A PARTIAL INTRODUCTION TO THE STUDY OF LEGAL HISTORY.

By WM. DRAPER LEWIS, Ph.D.

The word "law" is employed in the natural sciences and in jurisprudence. In its scientific sense, it conveys the idea of regularity. The sun rises in the East and sets in the West,—not sometimes, but always. The law of gravity is not occasionally, but always, true. Naturally, law can be defined as the order of the succession of natural phenomena. When any given set of conditions is followed by a given result the same antecedent will be followed by a similar consequent. Regularity is not only an essential element in our idea of natural law, but it is the only element in the idea. The word does not embody any conception of a command by an intelligent being to an intelligent nature. The regularity of nature's phenomena is a fact, and this regularity is labeled "law."

In jurisprudence, as well as in the natural sciences, the word "law" carries with it the idea of uniformity. Thus, the command of a despot to cut off the head of A. B. is not a law. On the other hand, if, in practically every case where a man dies intestate, the same rule for the division of his property is followed, then we have a law of intestate succession. Again, if, as a rule, every one who promises another to do or not to do a particular thing, does what he promises under given conditions, then we have a law recognizing the sacredness of contracts.

It is usually supposed, however, that while the regularity of the succession of phenomena is the sole feature of law as the word is used in the exact sciences, in the word as used in its juristic sense the command of a political superior to a political inferior is necessary to complete the idea. Without

denying that in some points of view this may be a correct assertion, I want to show that, for the purpose of historical investigation of the law in which the lawyer is learned, the word means only what it does to the scientific man, the regularity of the succession of phenomena. In this view, the only difference in the definition will be the difference in the phenomena with which the lawyer and the scientist deal. Law, in its juristic sense, will be confined to the actions of men in society. If a given condition produces a definite action on the part of men in society, then there exists a law in the legal acceptance of the term. Take an example: A., the father, is dead. B., C. and D. are his sons. Here we have an antecedent condition. Suppose that B., C. and D. will now each have the power to do what they wish with one-third of the property of the father. No other person in the community will have that power. Here we have following the definite condition, the definite action of the persons in the society in regard to each other, *i. e.*, between the brothers themselves and the rest of the community. If we can predict that the condition, a father leaving children, will be always followed by the action, the equal division of the father's property between the children, we have a law. The simplest definition for the word, as employed, in its juristic sense, is that law is a rule of action. In this view, it does not make any difference what the reason is for the acquiescence of the individual members of the community in the rule of equal division of property among children. It may be a rule of action because it has so been ordered by the legislature of the State, and the government will employ force against the individual who refuses to acquiesce; or it may be that no sanction follows the breaking of the rule of action. If, as a matter of fact, it is not broken, then we have a *rule* of action and a law.

As opposed to this view, it may be said that a mere custom, which anyone can break, is not a law. All men may rise at six in the morning, but if there is no obligation to do so, which obligation has a sanction or penalty for disobedience, then we have a rule of action perhaps, but not a law. Thus, in this view, the sense of obligation to follow the rule, as well

as the rule itself, is essential to the idea of law. And again, this sense of obligation, with a penalty for disobedience is, it is said, not the only additional requisite to the idea of law in its juristic sense. The penalty itself must be inflicted by the political authority known as government. Thus, it may be "dishonorable" for a man not to challenge another who has insulted him. The disapprobation of "society," more terrible than the pains of the law, may be the sanction of the rule of action, and yet the "laws of honor" are not *laws*; the penalties are not given by an organization; those who break them, have not disobeyed the commands of a political superior. The idea of a command by a political superior, capable of enforcing obedience, or the penalty for disobedience as well as uniformity, and the sense of obligation to follow the rule, are thus made essential to the idea of municipal law, or law in its juristic sense.

Thus, in the first view, law is simply a rule of action, if the rule is followed no matter from what motive, it is a law. There is only one difference between the term as so employed and as employed in the natural sciences. In the latter, universality and unchangableness, while impossible of absolute proof, are always assumed. With law in its legal sense, however, the liability to change exists, and while uniformity makes "human laws" rules of action, the uniformity in society is never universal. How universal a rule of action must be before it can be said to be a rule of action at all is a question of taste. We can draw the line anywhere we want to, except that absolute universality can never be insisted upon, or we would have no laws at all.

In the second view, two other requisites are necessary: the obligation to perform the law, and the enforcement of the obligation by a political organization which has commanded it to be obeyed.

Now both of these definitions as to the way in which the term law, in its legal sense, should be employed are, from their several points of view, correct. The difference indicates only a difference in the range of phenomena to be examined. One covers all rules of action, customs, as well as commands—

the other only those which are commands from organized government. If we desire to analyze and to study law as it is enforced to-day in the government under which we live, then, of course, all the elements contained in the second point of view are essential. But if we wish to adopt the historical method of studying the development of rules of action which are now enforced by our government, then we must abandon all thought of confining our observations to rules of action which have been commands, or even to those to which an obligation of any kind is attached.

From the historical standpoint, law is a rule of action and nothing more. Government is itself a growth as well as ideas of private property and mutual rights of persons in society. But the origin of rights lies back of the origin of governments. In fact, one of the causes for the growth of government was the felt necessity of enforcing a definite line of conduct irrespective of individual desire. But back of and prior to the enforcement of law on delinquent individuals, back even of the felt obligation on the part of the individual to follow definite lines of conduct, was the fact that definite lines of conduct were, as a rule, followed.

An illustration will tend to make my meaning clear. The possession of property in common by all the living members of the family, which is the origin of our law of the devolution of property on death, existed in "village communities." Yet this rule of law had no recognized government to enforce it. Thus the village community in India recognized, to a certain extent, this common enjoyment of property, and yet one cannot discern any organization or government which would have inflicted a penalty for the disregard of the rule. Again, the sense of obligation to follow it resting on the individual members of the community, if it existed at all, was probably exceedingly indistinct, because there was no idea of the possibility of not following it, and the obligation to obey a rule only comes with the recognized possibility of breaking it, and probably a realized personal advantage in so doing. The customs of primitive communities are more universal rules of action than any statute of modern governments, not because

the primitive rule of action is "obeyed;" but because the possibility of deviating from the rule does not occur to the primitive mind. When the possibility of deviating from the custom occurred, then the sense of obligation not to deviate had an opportunity to develop. With some rules of action, the idea of obligation became strong enough to enforce obedience on others who failed to feel the obligation. Thus all laws in the sense of commands by organized society through its government to individuals, have passed, if they are not of a purely administrative, corrective, or reformatory character, through three distinct stages. First, we find them simply customs; then customs which the individual felt, as a rule, a moral obligation to follow; and lastly, customs which the community, as a whole, felt justified in forcing the individual to conform to, regardless of his own desires or feelings of obligation. Thus, for instance, the morning gift of the Saxons, by which we mean the rule that a wife, on her husband's death, was entitled to one-half of her husband's property, was at first merely a custom for the husband to give the wife something to provide for her in case she outlived him, the reason for this provision was that among the Teutonic peoples the wife did not share as one of the children in the father's property, as at the Roman law. Afterwards, the custom of giving the wife one-half the husband's property as morning gift was so universal, and the felt obligation to make this provision so strong, that the courts enforced as law what the community had come to recognize as a moral duty. In the same way we can go over the development of contracts at the common law. It was not until the end of the last century that contracts in England were enforced as they are to-day. Yet the custom for men, as a rule, to perform their agreements, is not confined to the modern Englishmen. From the custom grew the obligation, from the obligation grew the enforcement of it as law.

Custom, therefore, is the life of law. Viewing the subject from the standpoint of the historian, law is the custom of the community. Of course, as society develops, the customs which will be enforced by the community are separated from those which the individual is left to follow or not as he will.

Something more than immemorial custom must be back of a rule of action before the community will enforce obedience to it. Dimly or vividly perceived, the welfare of the community in the continuance of the custom, some good higher than that of the single individual, stands back of all enforced customs, making valid the feeling of obligation for its performance, which is the justification for its enforcement.

The student of legal history, therefore, cannot permit himself to be confined to the laws which are "commands of government." The further he goes back in the history of any enforced law, the nearer he gets to the "custom" which was its origin, and which gives it to-day the vitality which really keeps it in force. The purpose of his study must be to trace the slow development of customs and ideas, and their effect in the development and change of positive and "enforced law."

In speaking of the "custom" which lies back of positive rules of action, it should be born in mind that it is only those customs which touch the everyday life of the individual that are of any great importance in relation to the development of jurisprudence. It is from these chief customs that the individual abstracts those ideas which lie at the base of his conception of social relations. These fundamental ideas are properly termed the "legal institutions" of the country. A legal institution simply denotes an all prevailing idea of social relations, which idea, growing out of the deep rooted customs of the community, is the foundation for numerous "rules of action." The modern idea of the marriage relation and its sacredness—the idea of freedom and sacredness of contracts—the idea of absolute ownership in severalty of property acquired—are all modern legal institutions or ideas of social relations fundamental to civilization as it exists and from which spring many minor rules of action. Into all the minor details of the law's development it is impossible for any one man to hope to go, but any one who has the inclination can study the development of the fundamental ideas of the family, the state, communal, and individual ownership, and mark their chief results in the domain of law. In view of the importance of such a study from the standpoint of one who professes to care anything about the

development of our civilization, it is a subject of wonder that so little general knowledge exists. This ignorance is perhaps due as much as anything else to the indifference of lawyers themselves to anything connected with the law which is not practical, *i. e.*, productive of immediate revenue.

Since, from the standpoint of historical jurisprudence, law is simply a "rule of action," the student of legal history is engaged primarily in tracing what have been and what are these rules of action, rather than in speculating on the power which enforced law. The "enforcement" is, as we have seen, not a necessary part of his conception of law, because he does not look on law as a command. But to the analytical jurist, *i. e.*, one who analyzes the law which the court to-day enforces, the "command" is the central idea in the conception of law. Thus, Austin, the chief of the analytical jurists, says that a law in its juristic sense is a rule laid down for the guidance of an intelligent being by a sovereign person or sovereign body of persons. In defining what he means by a "sovereign body of persons," he says that it is to be known by the following characteristics: First, "The bulk of a given society are in a habit of obedience or submission to a determinate and common superior, let that common superior be a certain individual person or a certain body or aggregate of individual persons. Second, that certain individual, or certain body of individuals, is not in a habit of obedience to a determinate human superior." Again, he says: "If a determinate human superior not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (so long as it remains united and independent of foreign dominion) is a society political, and the sovereignty is attached to it. From this there are deduced several corollaries. There cannot be two bodies sovereign in the same society. There cannot be such a thing as limited sovereignty. There cannot be a government at once supreme and dependent. There cannot have gone into elaborate government the principle of the sovereignty in different governments. There cannot be a government with the assumption that if he only

be able to lay his hand directly on the sovereign in any political society.

What Austin meant by sovereignty and sovereign, the writer fails to understand. The handling of the subject is foreign to the historical method of investigation with which he is familiar. The discussion of Austin, however, does suggest a real problem of no little difficulty, though whether it is the same problem which Austin was trying to solve, is not altogether clear. At any rate, it is one which lies at the threshold of the study of law's development and has to do with sovereignty in the only two senses in which the word is intelligible to the student of legal history.

In examining the facts of social and political life, we all recognize, first, that many laws are obeyed by particular individuals against their desire; and, second, that law develops and changes. Taking up this line of thought, we may ask ourselves two questions: What is it that enforces the law? What is it that changes the law? These are two distinct questions.

In primitive societies, law is not enforced in the modern sense. That is, a man can break the law if he wishes. The rule of conduct is followed because men never wish to break it. Therefore, in primitive societies the first question would have no meaning. But as society advances, the domain of law widens. That is, as it comes to deal with more complicated relations, and men's actions are less influenced by heredity and more by an intelligent appreciation of the pleasure resulting to themselves, there arises the necessity to enforce the law which would otherwise, in many instances, be disregarded. The machinery which enforces the law is known as government. The sovereignty in the community in its first sense is the force which stands back of the government in its enforcement of the law. Now, in a sense, no matter who has the government, whether a single person, or body of persons, whether we call it monarchical, aristocratic or democratic, the real factor which is back of the enforcement of law, is the brute force of the community. The people desire the law as it is, or they do not care to alter it, or know not how to alter it, which is the

same thing. The Czar of Russia is said to be sovereign through his dominions. He is said to command all the laws which he permits to exist. Yet his real strength lies in the fact that the brute force of the community is behind him aiding in the law's execution. Take a regiment under the leadership of a single man. In one sense, the commanding officer is the ruling power; in another sense, the regiment or rather any of the members who, by force of numbers, arms, skill, etc., could by brute force overcome the rest, is the power which would force the individual will if force were necessary. Carlisle has said that discipline in arms is always a miracle. I would add that law and government are also miracles. Why should the people, why should the army of Russia obey the Czar? Why should the people of the United States recognize as laws to be obeyed the acts of Congress or of State Legislatures? These are questions which I do not believe one of the sixty-five millions of us could answer satisfactorily to himself. If, therefore, we regard the question of sovereignty from a statical standpoint, as what enforces the law, we must answer that as far as there is any force, it is the brute force of the community.

We come now to the second question, "What causes changes in the law?" I suppose that most of us would ascribe such changes to legislation. Legislation is indeed the immediate source of many changes. But we must remember that only that is law which men in society actually, as a matter of fact, follow. Men follow a rule of action because they desire to follow it. The brute force in the sense just explained is behind those laws alone which the people, as a whole, desire to follow. They cease following one rule of action and follow another because they desire to change and follow that other. Be the causes of change what they may, the fact that man does change his ideas concerning rules of conduct is undisputed. Now, if A. changes his opinion, from whatever cause, of what it ought to be, C. may, from that very fact, change his opinion also. All of us, some in a greater and some in a less degree, influence others. Our changing opinions as to what ought to be the law, as far as they affect others, tend to change the law. If, therefore, we call sovereignty the power of changing the

law, in so far as each of us can effect our fellows we are each sovereign. Sometimes the changing opinions of one man changes or affects the opinions of many others. The Czar of Russia issues an ukase. It is his personal opinion as to what ought to be. Instantly, millions of Russians recognize that which he has said as the rule of action which, from various motives, partly religious, partly political, but mainly as an inherited tendency, they desire to and do follow. What a Czar does in high degree, a judge does to less extent. For instance, a court of high authority applies the principles of law to a new case. In doing so, the court may alter those principles hitherto received. This may be done consciously or unconsciously. True, the fiction is always kept up that the old principles are not altered. The farthest a court will ever admit that it has gone at the time of the decision, will be to say that it is returning to sound principles, anciently in force before some recent mistakes. And yet, if a new principle really has been established, the truth will in subsequent cases be acknowledged and even pointed out with pride. The Czar and the judge each have a large measure of sovereignty in this sense of the term. But this sovereignty, or the capacity to change the opinions of others and consequently to develop the law, is not confined to those in office. The individual advocates a change in the laws, others follow his opinion, and as a result of his agitation, the change takes place. Thus each of us are in a degree sovereign, but each in a different degree.

In this second sense, as the actual power to change the law sovereignty is never absolute. We have never heard of a person, no matter what influence he might have on the desires of others, who was sovereign in this absolute sense. Take the most absolute monarch that ever sat upon a throne, (and none more absolute than the eastern potentate, whose "word is law" and whose subjects would sacrifice their lives to grant him the slightest wish) even he is not sovereign, perhaps, indeed, far less sovereign, in the sense we are now discussing, than many a private citizen of influence in a western community. For if an eastern potentate ever thought of legislating, which he never does, except to enact a new tax

law; if he ever, for instance, attempted to change the law of the devolution of property on death, perhaps taking from the heir, the ability (prized by all religious Hindoos), to perform the sacra, he would find that his law, for the first time, would not be obeyed, and his power would be undermined. In a certain class of laws, those dealing with the army and the revenue, the sovereignty is unquestioned, but on other subjects there is practically no sovereignty at all.

Take again the Congress of the United States. Are its members sovereign? In a sense, yes; in another, no. Let them all be convinced, or a majority of them, that interstate freight should be regulated along certain lines, then regular action will on this subject make a new law. It is absurd to say that in this instance they hold but a delegated sovereignty. The people who elected them may have never thought of interstate commerce or its regulation. On certain subjects these men are sovereign, but only on certain subjects. Let them pass a statute giving the property of the country to men over six feet. This could never be a law in the sense in which we use that term as a recognized legal relation. It is true it would be unconstitutional, but though the written constitution were to be formally abolished to-morrow, and the Congress in formal terms said to be unlimited in power, the limitation to its sovereignty by the facts, would still remain unaltered. It could no more make an act, such as we have mentioned, recognized as law, than could the British Parliament, which is theoretically omnipotent. A limited sovereignty is often said to be a contradiction in terms. It would seem, however, from our analysis, that if we mean by sovereignty, the actual, not theoretic power, to change the laws, *sovereignty is always limited*. And not only is sovereignty in this sense always limited, but if we add together the sovereignty of a great number of persons, the sum will never be any absolute sovereignty in the sense that any change which they may advocate will be followed by the brute force of a community and given the force of law. The changing opinions of influential men would not alone suffice to change the laws in every particular. Man's influence over his fellow men is never so

absolute. Law has its basis ultimately in the conditions physical, economic and social which exist. The influence of a change in opinion without a change in conditions must be limited.

Before leaving the subject it may be well to point out that the term sovereignty is sometimes used in a purely legal sense, as the theoretical power to make absolute changes in the law. Thus, in this sense, Parliament is absolute. Any rule of action made by it would be technically law from the lawyer's standpoint; though, as we have seen, not *actually* law, because the direction of Parliament would, as a matter of fact, only be followed within certain limits. In this sense, conventions in three-fourths of the United States are with us sovereign, because their united action could produce a change in our constitution. As used in this last sense, the term "sovereignty" is of no importance to the student of law's development. His business is to deal with actualities—not with theoretic possibilities.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Ellis, Esq., 775 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-IV. San Francisco: Bancroft-Whitney Co. 1895.

HAND-BOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY. St. Paul: West Publishing Co. 1895. (No. 3, Hornbook Series.)

HAND-BOOK OF INTERNATIONAL LAW. By Captain EDWIN F. GLENN, Acting Judge Advocate U. S. Army. St. Paul: West Publishing Co. 1895.

THE LAW RELATING TO THE PRODUCTION AND INSPECTION OF BOOKS, PAPERS AND DOCUMENTS IN PENDING CASES. An Address by THOMAS J. SUTHERLAND. Chicago: The Gladstone Publishing Co. 1895.

OUTLINES OF TRIAL PROCEDURE. By J. L. BENNETT. Donohue & Henneberry (Printers), Chicago. 1895.

YOUR WILL: HOW TO MAKE IT. By GEORGE V. TUCKER. Boston: Little, Brown & Co. 1895.

SELECTED CASES, ETC.

AMERICAN RAILROAD AND CORPORATION REPORTS, Annotated. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

AMERICAN ELECTRICAL CASES. With Annotations. Volume III. 1889-1892. Edited by WILLIAM W. MORRILL. Albany: Matthew Bender. 1895.

PAMPHLETS.

THE QUIZZER SERIES. Nos. 8 and 9. Questions and Answers on Common Law Pleading (No. 8). By GRIFFITH OGDEN ELLIS and EMIL W. SNYDER. Questions and Answers on Corporations (No. 9). By WM. C. SPRAGUE. Detroit: The Collector Publishing Co. 1895.

UNIFORM STATE LEGISLATION. By FREDERIC J. STIMSON. A Paper Submitted to the American Academy of Political and Social Science. Publication No. 145, of the American Academy of Social Science, Philadelphia. 1895.

BOOK REVIEWS.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I.

By SIR FREDERICK POLLOCK, Bart., M.A., LL.D., and
FREDERIC WILLIAM MAITLAND, LL.D. Two Volumes.
Cambridge: The University Press. Boston: Little, Brown
& Co. 1895.

The work before us deals with the period of English history down to the reign of Edward I. It was during this period that the law of England was formed and that the lines along which it was to develop were marked out. It is this fact, strongly brought out by our authors, which makes their work of great value to the legal profession. Learning and research are here made use of to explain the origin of principles and institutions with which the lawyer has to deal every day.

The first volume opens with a sketch of the history of the law from Anglo-Saxon times to the age of Bracton. The Anglo-Saxon system of compensation for injuries and their primitive methods of investigation are clearly portrayed. The Norman Conquest, by strengthening the power of the crown, led to a rapid increase of the royal jurisdiction. The law administered in the King's courts became the common law of the realm and so prevented local custom from hardening into law. The growth of the jurisdiction of the King's court is seen in the increasing number of new writs issued out of chancery. These writs were all the more in demand, because they gave the suitor the benefit of the new method of investigating facts, which the Norman kings had begun to make use of in asserting their own rights. The Frankish inquest, introduced into England by the Norman kings, is the origin of trial by jury. The jury in its widest sense was a body of neighbors summoned by some public officer to give upon oath a true answer to some question.

The general view of the development of English law prepares the way for its more detailed study under the three heads of law tenure, personal condition, and the law of jurisdiction. In

its treatment of these subjects the work displays broad learning, patient research, and discriminating judgment. In nearly every subject touched upon an addition is made to the stock of knowledge. Legal facts are brought into relation with social and economic facts and legal history is studied in connection with other phases of development without which it can never be understood. The chapter on the origin of corporations will prove of special interest to lawyers. It is the best thing that has been written on the subject.

In the first volume the kinds of tenure, the sorts and conditions of persons, and rights of jurisdiction, whether belonging to persons or communities, are studied in their relation to the state and as part of its political order. The second volume, however, deals with private rights and relations. Ownership and possession are studied under the following headings: rights in land, seisin, conveyance, the term of years, the gage of land, incorporeal things, movable goods. Then follow chapters on contract, on inheritance, on family law, on crime and tort, and on procedure.

This monumental work, which is mainly from the pen of Professor MAITLAND, must prove invaluable to all who have a scholarly interest, either in English law or English history. "Those few men," so runs its closing sentence, "who were gathered at Westminster, round Pateshull and Raleigh and Bracton, were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic; they were making right and wrong for us and for our children."

Prof. RICHARD HUDSON.

Michigan State University,
Ann Arbor.

OUTLINE OF THE INFRINGEMENT OF PATENTS FOR INVENTIONS,
NOT DESIGNS. Based solely on the Opinions of the Supreme
Court of the United States. By THOS. B. HALL, of the
Cleveland Bar. New York and Albany: Banks & Brothers.
1895.

The purpose of this admirable little treatise of fifty-three pages is set forth by Mr. Hall in his preface, as f-

"The aim hereof is to concisely present the doctrine that is settled by our final authority. It is substantially a summary of established points, from among the opinions severally set forth in my recent detailed treatise on this subject—plus subsequent cases." This purpose is strictly adhered to and the same arrangement of subject-matter, seen in the earlier work, is followed. The subjects treated are: I. License Under Patent; II. Identity of Invention; III. Validity of Patent and IV. Recovery for Infringement, these being the subjects, in proper order, necessarily disposed of in the normal suit for patent infringement, as Mr. HALL treats the subject. At the end of the work is a complete collection of Supreme Court decisions arranged chronologically under the decisions of subject-matter, followed in the text and enabling one at a glance to trace the growth of doctrine in the decisions which have developed it.

The "Outline" should be valuable to the practitioner as a work of quick and general reference, especially in presenting immediately lines of authority supporting the text, and to the layman, as a clear, succinct statement of the law relating to the infringement of patents, neither burdened with detail nor of so highly technical a character as to be impractical.

R. SAILER.

CURRENT EVENTS

OF GENERAL LEGAL INTEREST.

Although, perhaps, more properly the subject for political or ethical comment, the present state of affairs in the City of New York cannot fail to interest the legal world in its broad sense. Laws are not supposed to be enacted only to be ignored, or, what is far worse, to be enforced or overlooked as the political convenience of the executive branch of government may suggest. One of the first principles instilled into the mind of the embryo lawyer, (would that it could be into that of the embryo legislator!), is the danger of the growth of disrespect for law in general which arises from the observance of its

The Struggle
for the
Observance
of the
Law in New
York

neglect in particular instances. Of course, in these days the historically learned may know that laws are after all merely the crystallization of customs, but this class is still in a decided minority. The great body of the people for whom laws are made, or at least who live under them, must learn to obey the laws, or they will soon come to regard them with contempt, a far more dangerous feeling in the long run than out and out dislike.

In short, the only course open to New York seems to be to enforce the law as long as it is the law. If it is unpopular there is the remedy of repeal. If the lapse of time is necessary before this can be accomplished the lesson will be all the more likely to be appreciated. The responsible citizen realizes this and sacrifices his convenience and comfort to the principle whose importance he cannot fail to recognize.

Regret for the death of Mr. Justice Jackson is naturally coupled with interest as to who will succeed him. With the many places of appointment at the disposal of the President there are none he so rarely has the opportunity to exercise, none of more real importance to the country, or which call for a more careful exercise of impartial judgment than supreme court vacancies.

Unfortunately, the comparative *otium*, even with all its *dignitas*, of a career upon this Bench does not appeal to some successful leaders of the active Bar, whose appointment might otherwise be hoped for, and this sometimes necessitates the falling back upon jurists of less celebrity. This, however, need not prevent the selection of a man of irreproachable integrity, fair unprejudiced ideas, sound training, and last, but not least, undeviating patriotism.

The proverbial conservatism of the City of Philadelphia is now involved in a question in which its equally noted patriotic spirit plays a part. The subject in dispute is so famous and the principles of law growing out of it so interesting in these days of municipal reform agitation that the case will be watched with curiosity by the legal profession at large.

The
Supreme Court
Vacancy

The case
of the
"Liberty Bell"

It appears that the officials of the forthcoming "Cotton States Exhibition," to be held at Atlanta, Georgia, having extended to the citizens of Philadelphia, through their Mayor and Councils, a general invitation to attend and to send exhibits, the City Councils accepted this general invitation, and, following the precedent established at the time of the World's Fair at Chicago, went to the further alleged uncalled for extent of resolving to send the famous old Liberty Bell from its resting place in Independence Hall.

Aroused by this to them seemingly improper, not to say perilous scheme of the city fathers, certain private citizens and taxpayers have filed a bill in equity praying for an injunction to restrain the removal of the historic heirloom, alleging, among other grounds, the following: that the proposed action would be "an improper diversion of corporate property possessing great intrinsic value;" that it would "strip the shrine [Independence Hall] of its most precious and venerated treasure;" that it will "deprive the complainants and all other citizens, residents and sojourners of Philadelphia of their rightful possession and enjoyment of the Bell;" that "it tends to establish a precedent for future separations of the Bell from its present hallowed associations." The concluding allegation denies the legality of the ordinance as being directed in furtherance of an object not municipal in character.

The sentimental side of the question makes the case an unique one; the result of the objection to the appropriation on the last of the above mentioned grounds will go a step toward defining the powers of municipal legislative bodies with regard to the objects for which they may spend the public money.

W. S. E.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

SEPTEMBER, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR AUGUST.

Edited by ARDENUS STEWART.

The Supreme Court of Errors of Connecticut has recently decided (1) That the act of that state, (Gen. Stat. Conn., § 2137), which provides that the board of school visitors of any town may require that every child shall be vaccinated before being permitted to attend the public schools, is not in conflict with

Constitutional
Law.
Compulsory
Vaccination

Art. I., § 1, of the constitution of Connecticut, providing for equality of rights, or with the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of any rights without due process of law, or deny to him the equal protection of the law; and (2) That under Gen. Stat. Conn., §§ 2137, 2197, prescribing the powers and duties of school visitors, and empowering them to impose vaccination as one of the conditions of attending the public schools, the school committee of a town has authority to pass a vote that every pupil attending the public schools shall, at the beginning of the school term, present evidence of vaccination before he shall be allowed to attend school, and that after the spring term of that year all pupils not vaccinated shall be excluded, although there was at the

time no case of small-pox in the town, and no epidemic threatened: *Bissell v. Davison*, 32 Atl. Rep. 348.

An act which provides for the vaccination of all children attending the public schools, and for the exclusion of unvaccinated children therefrom, is sufficiently general in its scope, and is a constitutional exercise of the police power of the legislature: *Abel v. Clark*, 84 Cal. 226; S. C., 24 Pac. Rep. 383. So, a regulation of the school board, which excludes pupils who will not undergo vaccination during the prevalence of an alarm over the report that there is a case of small-pox in the city, is not unreasonable. In *Duffield v. School District of Williamsport*, 162 Pa. 476; S. C., 29 Atl. Rep. 742, 34 W. N. C. 525, the councils of the city of Williamsport had passed an ordinance in 1872, providing that no pupil "shall be permitted to attend any public or private school in said city, without a certificate of a practising physician that such pupil has been subjected to the process of vaccination." On the occasion of a small-pox scare, the board of health of the city sent a communication to the school authorities, requesting them to take action to the effect "that no pupil shall attend the schools of this city except they be vaccinated or furnish a certificate from a physician that such vaccination has been performed." The school board accordingly adopted a resolution in conformity with the recommendation of the board of health, and the plaintiff's son, having neglected to comply with this resolution, was refused admittance to the public schools. The plaintiff thereupon brought suit for a mandamus to compel the school board to admit him; but the application was denied, and the denial was affirmed by the Supreme Court, which held that the regulation was a reasonable one; that whether or not vaccination is an efficient preventive of disease is not a question for the courts; and that as there is a difference of opinion on the subject among medical authorities, a school board must decide in the exercise of its discretion whether it will or will not, for the protection of the children under its care, exclude unvaccinated children from the school, and this discretion will not be interfered with by the courts.

The Supreme Court of Florida, in *Bloxham v. Florida Cent. & F. R. R. Co.*, 17 So. Rep. 902, has lately held, that a suit in equity by a railroad company against the state officers charged with the collection of taxes, praying that its lines be declared exempt from taxation under the laws of the state, that the said officers be restrained from selling any portion of its property for default in payment of taxes previously assessed, and that they be ordered to repay to the plaintiff all moneys theretofore improperly collected on account of said assessments of taxes, is, as to the last prayer for relief, to all intents and purposes a suit against the state for the recovery of money, and a judgment or decree against the officers named as defendants would be a judgment or decree against the state; and that that branch of the suit should be dismissed for want of jurisdiction.

A suit to enjoin a state officer from assessing or enforcing a tax for which there is no authority or warrant under the state laws is not in substance a suit against the state, within the prohibition of the eleventh amendment: *Sanford v. Gregg*, 58 Fed. Rep. 620. So, also, a suit against the railroad commissioners of a state, to restrain the enforcement of their regulations, as unjust and unreasonable, is not, if the state has no pecuniary interest involved, within the eleventh amendment: *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; S. C., 14 Sup. Ct. Rep. 1047; *Clyde v. Richmond & D. R. Co.*, 57 Fed. Rep. 436. A suit in equity against the board of land commissioners of a state, brought by a purchaser of lands under a statute of that state, in order to restrain the defendants from doing acts which the bill alleges are in violation of the plaintiff's contract with the state when he purchased the lands, and which are unconstitutional, destructive of the plaintiff's rights and privileges, and which it is alleged will work irreparable damage and mischief to his property rights so acquired, is not a suit against the state: *Pennoyer v. McConaughy*, 140 U. S. 1; S. C., 11 Sup. Ct. Rep. 699, affirming 43 Fed. Rep. 196, 338; S. C., 14 Sawy. 584.

When a corporation, engaged in interstate commerce, is prosecuted by a state board of officers for failure to comply

When a new corporation is formed by the consolidation of two or more other corporations, and no provision is made by statute or by the articles of incorporation for the payment of the debts and liabilities of the constituent corporations, the new corporation assumes all the debts and liabilities of the constituent companies, which follow as an incident of the consolidation; and, under such circumstances, such consolidated corporation is not an innocent purchaser for value of the property of its constituent companies, so as to prevent the state from subjecting the same to the payment of taxes thereon: *Bluxham v. Florida Cent. & P. R. R. Co.*, (Supreme Court of Florida,) 17 So. Rep. 902.

The courts cannot be influenced in their action by objections which do not apply to the constitutionality, but only to the policy, the justice, and the wisdom of the law in question. The relief from such legislation, if the objections urged are well taken, must come from the legislative, and not the judicial, department of the government. The courts are bound to uphold the statutes, unless they are clearly in conflict with the constitution: *Bluxham v. Florida Cent. & P. R. R. Co.*, (Supreme Court of Florida,) 17 So. Rep. 902.

This may well be commended to some courts, which act as if their prejudices were the only criteria of the propriety of a statute, and whose contortions in the effort to get an unconstitutional view of a case would be ridiculous, if the effects were not so disastrous.

The Queen's Bench Division has lately rendered a very interesting decision in regard to the liability of the members of a social club under police regulations. The respondent was charged with an offence against the Betting Act of 1853, (16 & 17 Vict. c. 119, § 1,) which enacts that "no house, office, room, or other place shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same betting with persons resorting thereto." The

Corporations.
Consolidation.
Taxation

Courts.
Ratio
Decidendi

Criminal Law.
Betting.
Social Club

premises in question were owned and occupied by a club, registered under the Companies' Acts. By the rules, each member was required to hold at least one share, and disputes as to bets were settled by a committee. Refreshments and dinners were served in the club, and newspapers provided. Members were in the habit of betting with each other in the club-room, which was used exclusively by members, but no member had any particular place allotted to him. The respondent, who was a member, made bets on the club premises with other members. On these facts, it was held that he was not guilty of an offence against the act: *Downes v. Johnson*, [1895] 2 Q. B. 203.

According to a recent decision of Judge PHILIPS, of the District Court for the District of Kansas, First Division, when.

**Erroneous
Sentence,
Effect of
Reversed**

a sentence different from that authorized by law has been imposed on a defendant convicted of a criminal offence, and the judgment has been reversed for that error, and the cause remanded to the trial court, with instructions to proceed therein according to law, the trial court resumes jurisdiction of the cause at the point where the error supervened, and has authority to resentence the defendant, and impose the penalty provided by law, although part of the void sentence has been executed: *U. S. v. Harman*, 68 Fed. Rep. 472.

But the same judge has also held, in *United States v. Woodruff*, 68 Fed. Rep. 536, that when a defendant was convicted of embezzling moneys received by him as

**Erroneous
Sentence,
Effect of
Reversed,
Autorefo
Convict**

assistant postmaster, and by consent of the district attorney, in view of the insolvency of the defendant, a verdict was taken upon the issue of embezzlement alone, without any finding of the amount embezzled, and the court sentenced the defendant to imprisonment only, without rendering judgment, by way of fine, for the amount embezzled, for which error the judgment was reversed and the cause remanded for further proceedings according to law, the trial court was without authority to fix the amount of the fine without the verdict of a jury, and as the opinion of the appellate court established the fact that the

two issues were inseparable, and must be tried together, the defendant having been once in jeopardy on the issue of the amount embezzled, must be discharged.

The Supreme Court of California has lately ruled, in *Judson v. Giant Powder Co.*, 40 Pac. Rep. 1020, that a presumption of negligence arises from the fact that an explosion has occurred in a dynamite factory, when there is evidence that dynamite, if carefully handled, will not explode, and expert evidence is admissible to establish the latter fact; and the fact that a person sold the land adjoining his own for a dynamite factory will not preclude him, on the maxim "*volenti non fit injuria*," from suing for injuries to his own land and the improvements thereon, resulting from the negligent handling of an explosive necessary for the manufacture of dynamite.

Dynamite
Explosion,
Evidence,
Estoppel

When a fund is deposited with a trustee to pay a creditor, who is free to accept or reject the benefit of the trust, the fact that he prosecutes a pending suit against the debtor to judgment, with full knowledge of all the circumstances, shows an election to reject the trust: *White v. White*, (Supreme Court of Alabama,) 18 So. Rep. 3.

The disputes as to the validity of ballots under the Australian Ballot Laws still continue. The Ballot Act of Wyoming, (Acts 1890, c. 80,) provides, in § 110, that the county clerk shall furnish a stamp with an ink pad to the judges of election for the purpose of stamping the official ballots; § 119 provides that the judge who delivers the ballot to an elector shall first mark it with this stamp, and write his name or initials upon the back of each ballot, directly under the official stamp; § 122 requires the elector to fold the ballot so that the face will be concealed, and the indorsement may be seen; and § 130 provides that "in the canvass of the votes any ballot which is not indorsed by the official stamp or has not the name or initials of the judge of election as

Elections,
Ballots

provided in this act shall be void and shall not be counted." This last provision was held, in *Slaymaker v. Phillips*, 40 Pac. Rep. 971, by the Supreme Court of Wyoming, against the dissent of Chief Justice GROESBECK, to mean that both the official stamp and the name or initials of the judge of election must appear on the ballot, and further, that they must appear upon the exterior of the ballot when folded so as to conceal its face. The court also held, with the same dissent, that this act was in full conformity with the constitution of Wyoming, Art. 6, §§ 1 & 2, giving to certain citizens, not falling within any of the classes excluded, the right to vote; with § 11, which provides for elections by a secret ballot, and enacts that only the official ballots shall be received and counted; and with § 13, which imposes upon the legislature the duty of passing laws to secure the purity of elections.

According to a recent decision of the Court of Appeal of England, when a married woman has separate property subject to a restraint on anticipation, the restraint applies to income which has become due, but has not yet been paid to her; and therefore such income cannot be made available in execution upon a judgment against her, even although it had accrued due at the date of the judgment: *Lofthus v. Heriot*, [1895] 2 Q. B. 212.

The Supreme Court of South Carolina, in *Butler v. Ellerbe*, 22 S. E. Rep. 425, has neatly evaded the question as to the constitutionality of the Registration acts of that state, one of which, passed in 1882, (Gen. Stat. 1882, § 90, &c.,) provided that in 1882 a registration of voters should be made, and the registration books closed; that thereafter such books should be open once a month after the general election in each year, until the first of July preceding each general election, (usually held in November,) for the registration of persons thereafter becoming entitled to vote; that, after the closing of the books in each year, persons coming of age before the election might be

Husband and
Wife,
Separate
Property,
Restraint on
Anticipation,
Execution

Injunction
Against
State Officer,
Restraining
Disposition of
Public Funds

registered ; and that, upon the registration of any voter, a certificate of registration should be given him, without the production of which he should not be allowed to vote, and which, upon removal from one county to another, must be transferred and renewed under onerous conditions ; the other of which statutes, passed in 1894, providing for the election of members of a constitutional convention, also provided that a person not registered in 1882, or at a subsequent time when he would have a right to register, might register within a certain time, upon making affidavit, supported by that of two respectable citizens, as to various particulars of his occupation and residence at the time he might have registered and thereafter. It was attempted to raise the question by a proceeding to restrain the comptroller-general and treasurer of the state from disbursing funds for the payment of the officers under those acts, on the ground that they were unconstitutional, and that the payment of the said funds was therefore unlawful, and would cause an irreparable injury to the petitioner, a citizen and resident taxpayer of the state. But the majority of the court cleverly dodged this issue, although on different grounds. Mr. Justice GARY held that the proceeding was in effect a suit against the state, to which the state was an indispensable party, and which therefore could not be maintained without its consent. But with this view both Chief Justice McIVER and Justice PORZ differed. Justices GARY and PORZ, however, agreed, against the dissent of Chief Justice McIVER, that the action could not be maintained, the former holding (1) That the proceeding did not necessarily involve the determination of the constitutionality of the registration act, and therefore that question could not properly be passed upon, and (2) That an injunction would not lie to restrain the state officers from paying the salaries in question, on the ground of the unconstitutionality of the registration act, because the state, if it could be sued, would be estopped from interposing the objection that the services rendered at her instance and for her benefit were illegal : Justice PORZ maintaining (1) That a petition for an injunction to restrain state officers from disbursing public funds pursuant to an act

of the legislature appropriating moneys for the payment of salaries to the supervisors of registration and other election officers appointed under the registration act, on the ground that that act was an unconstitutional abridgment of the elective franchise, but which fails to allege that any one has been deprived of his right to vote by reason of said act, presents a purely abstract proposition of law, which it is not the duty of a court of equity to decide; and (2) That such an injunction would not lie, because the petitioner had an adequate remedy at law. From all these propositions, Chief Justice McIVER dissented, holding, and rightly, (1) That an injunction will lie at the suit of a taxpayer to enjoin the illegal disposition of state funds arising from taxation; (2) That one who has been elected to office by the general assembly, whose members were elected under the registration act, is not estopped to institute an action, as a taxpayer, assailing the constitutionality of that act; (3) That when the purport and effect of a registration law is to add to or take away any of the qualifications prescribed by the constitution, or when its effect is to obstruct, subvert, or even unnecessarily to impede the exercise of the right conferred by the constitution, it cannot be sustained, but must be held an unconstitutional invasion of the right of suffrage; (4) That the Registration Act of South Carolina of 1882, (Gen. Stat. S. Car. 1882, tit. 2, c. 7; Rev. Stat. S. Car. 1893, tit. 2, c. 8) is an unconstitutional limitation of the right of suffrage; and (5) That the petitioner has no adequate remedy at law.

These acts, however, have been held unconstitutional by the United States Circuit Court, in *Mills v. Green*, 67 Fed. Rep. 818. See 2 AM. L. REG. & REV. (N. S.), 486.

The Supreme Court of New York, Fifth Department, in *Snack v. Travellers' Ins. Co., of Hartford*, 34 N. Y. Suppl., 545.

Insurance,
Accident,
Total Loss

has overruled its former decision in the same case, 30 N. Y. Suppl. 881, and now holds that in an action on an accident insurance policy, when the

plaintiff's surgeon testified that the fingers and the head of all

the metacarpal lines of the injured hand were cut off, that a little over half the hand, anatomically speaking, was gone, that thirteen of the twenty-seven bones of the hand were entirely gone, and parts of five more, and that the portion of the hand remaining was more useful than if the amputation had been at the wrist, but that he had no use of it as a hand; and the plaintiff, who on the first trial testified that he could use the injured hand for certain purposes, testified on the second trial that he had no use of the injured member as a hand, and explained his testimony on the former trial by stating that he meant that he had the use of the whole arm, not the use of the hand;—that on such evidence the plaintiff had lost his entire hand, within the meaning of the policy. See 2 AM. L. REG. & REV. (N. S.) 86.

The nature of the bond of indemnity given by a fidelity insurance company to ensure the proper performance of the duties of an officer in a position of trust, has recently been very fully examined by the Circuit Court for the Middle District of Tennessee, in *Mechanics' Savings Bank & Trust Co. v. Guarantee Co. of North America*, 68 Fed. Rep. 459. Such a bond, the court holds, is analogous to an ordinary policy of insurance, and is governed by the same principles of interpretation; and accordingly (1) When a bond issued by a fidelity insurance company provides that the answers made by the employer to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they were "knowingly false;" (2) When, in an application to a fidelity insurance company for a cashier's bond, the bank in answer to a question, stated that there had never been a default in the position of cashier, a controversy between the bank and a former cashier about certain commissions made by the latter, which he thought was an individual matter, while the bank thought he should account for it, as his time was paid for by the bank, was not a default within the terms of the contract; (3) That a printed condition in a bank teller's bond issued by a fidelity insurance company, requiring

inspection of his accounts at least once a year, is satisfied by a quarterly examination required by the contract as actually agreed on and written out at the time of executing the bond ; (4) That when a bank teller's bond issued by a fidelity insurance company required the bank to " observe all due and customary supervision over said employe for the prevention of default, and the only supervision expressly agreed on was a quarterly examination of the books and accounts as regularly made by the bank on its own account, and a report of any known speculations on the part of the teller, an examination in good faith, such as was customary, and such as the committee appointed deemed sufficient for the protection of the bank and its stockholders, was sufficient to satisfy the requirement of the bond, though it was somewhat loose and careless; and (5) That when a bank teller's bond required the bank, on becoming aware of the employe being engaged in speculation, to report the fact to the surety, and the bank hearing of speculation by the teller, on investigation found that he had once contributed two hundred dollars toward the formation of a brokerage association, but, becoming dissatisfied, had sold out, the failure to disclose the result of the inquiry would not, in the absence of bad faith, invalidate the bond.

When a bond of indemnity recited that the association of which the officer was treasurer had delivered to the surety company certain statements relative to the duties and accounts of the treasurer, which it was agreed should form the basis of the contract in it, it was held that if such statements involved no misrepresentation or concealment, the contract could not be affected by loose parol statements, or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed ; nor by conversations as to laws of the association with its vice-president, at the time of application for the bond, as it did not appear that he had authority to make any representations on the subject ; nor by the fact that at the time of such application the treasurer was in default to the association, there being no representation to the contrary in the statements delivered, and nothing to show that at that time the fact was known to any officer of the association :

Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, 63 Fed. Rep. 48.

The Queen's Bench Division, in a case tried before MATHEW, J., without a jury, *Asfar v. Blundell*, [1895] 1

Marine
Insurance,
Profit on
Charter.
Total Loss

Q. B. 196, has recently decided some questions of considerable importance with respect to marine insurance. A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading, at freights, payable on right delivery, which in the aggregate exceeded the charter freight. The charterers then insured their "profit on charter" by a policy which contained a warranty against average. On the arrival of the ship, part of the cargo was delivered, and freight was accordingly payable under the bill of lading for that portion; but the residue, owing to sea damage, was in an unmerchantable condition, and freight was, therefore, not payable for it; the result being that the total amount of the freights payable under the bills of lading was less than the charter freight, and the charterer's profit was consequently lost. Under these circumstances, it was held that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty; and that the fact that the charter freight was a lump sum and not a tonnage rate could not avail the defendants, since it was not one which the assured were bound to disclose, the underwriters being put upon inquiry to ascertain the terms of the charter, the profit on which they purported to insure.

The court just mentioned has also recently decided a very interesting case under the Licensing Act of 1872, (35 & 36 Vict. c. 94, § 3.) A brewer, who had a license for the sale of beer by retail, at a specified place, was in the habit of sending round his cart containing jars of beer to houses in the neighborhood; the jars of beer were delivered from the cart at the customers' houses in pursuance of orders given by the customers at their houses to the carter in the previous week, the price being paid by the customer to the

Intoxicating
Liquors.
Sale

carter in the week succeeding delivery. There was no mark on label upon the jars to show that any particular jar had been appropriated to any particular customer; and the court held that the sale of the beer must be taken to have been at the house of the customer and not at the licensed premises, and that the brewer was properly convicted of selling intoxicating liquor at a place where he was not authorized by his license to sell: *Pletts v. Campbell*, [1895] 2 Q. B. 229.

According to a late ruling of the Supreme Court of Alabama, the disqualifications declared by the Code of that state, § 647, which provides that no justice "must sit in any cause or proceeding in which he is . . . related to either party within the fourth degree of consanguinity or affinity," are not exclusive of the disqualifications of the common law; and, therefore, a justice of the peace who married a first cousin of the defendant is incompetent to try the cause, when there are children of the marriage surviving, though the wife is dead: *Pegues v. Baker*, 17 So. Rep. 943.

A communication relating to state matters made by one officer of state to another in the course of his official duty is absolutely privileged, and cannot be made the subject of an action for libel: *Chatterton v. Secretary of State for India in Council*, (Court of Appeal of England,) [1895] 2 Q. B. 189.

The libel complained of in this case was made by the Secretary of State for India to the Parliamentary Under-Secretary for India in order to enable him to answer a question asked in the House of Commons with regard to the treatment of the plaintiff, an officer in the Indian Staff Corps, by the Indian military authorities and Government, and stated that the Commander-in-Chief in India and the Government of India, in a dispatch in the secretary's possession, recommended the removal of the plaintiff to the half-pay list as an officer whose retention on the effective list was in every way most undesirable. This statement the plaintiff alleged to be false.

Communications made by one officer to another, in the discharge of his duty, are privileged: *Pittard v. Oliver*, 63 L. T. N. S. 247; and an action for libel will not lie against the members of an investigating committee appointed by a town with which the plaintiff had a written contract, for defamatory matter contained in a printed report made by them to the town; for in making the report the committee is performing a duty imposed upon it, and is communicating to the voters and taxpayers of the town the results of an investigation in which they have an interest, and which they have the right to know and act upon, and the occasion is such as to protect the committee from a liability for such statements contained in the report as are made in good faith, without malice, and with reasonable cause to believe them true, and which do not go beyond what is fairly required of them in the discharge of their duty: *Howland v. Flood*, 160 Mass. 509; S. C., 36 N. E. Rep. 482. The same is true of any investigating committee: its report will not be actionable, without proof of express malice: *In re The Investigating Commission*, 16 R. I. 751.

The regulation of pawnbrokers, junk dealers, and dealers in second-hand goods, is within the police power, and an ordinance requiring such dealers to take out a license, ^{Licenses,} ^{Junk Dealers} under certain restrictions, is not unreasonable, merely because it requires them to give a bond in addition to the payment of the license fee, provides that they shall keep a record of their purchases and sales, and to furnish a statement thereof to the police department, requires that their applications for license be signed by twelve freeholders certifying to the good character and reputation of the applicant, prohibits them from purchasing from boys, intoxicated persons, or habitual drunkards, and provides as a condition precedent to the issue of a license that the applicant shall agree that his license may be revoked at the will of the city council: *City of Grand Rapids v. Brandy*, (Supreme Court of Michigan,) 64 N. W. Rep. 29. A similar statute, requiring pawnbrokers to keep a record of things pawned, and submit to the inspection

of the police officials, on demand, was held constitutional by the Supreme Court of Missouri, in *City of St. Joseph v. Levin*, 31 S. W. Rep. 101. See 2 AM. L. REG. & REV. (N. S.) 439.

The Court of Appeal of England, in *Robb v. Green*, [1895] 2 Q. B. 315, has affirmed the judgment of HAWKINS, J., in *Robb v. Green*, [1895] 2 Q. B. 1, (See 2 AM. L. REG. & REV. (N. S.) 497,) that it is an implied term of the contract of service that the servant will observe good faith towards his master during the existence of the confidential relation between them; and that when one who is employed as manager of his employer's business surreptitiously copies from his master's order-book a list of the names and addresses of the customers, with the intention of using it for the purpose of soliciting orders from them after he had left the plaintiff's service and set up a similar business on his own account, and does so use the list after the termination of the service, his conduct is a breach of that implied contract, and entitles the master to damages and an injunction against the use of the list.

The Supreme Court of New Jersey has just declared constitutional a statute passed by the legislature of that state during its last session, for the purpose of protecting the franchise from ignorant and unworthy foreigners, who have hitherto often been naturalized immediately preceding election in large blocks, through the instrumentality of party committees.

One of the provisions of the law denies to party committees or candidates the right to pay the fees of applicants for naturalization papers. Another provides that "no person shall hereafter be naturalized or admitted to be a citizen of the state within the next thirty days preceding any national, state, municipal, general, special, local or charter election."

It was on this provision that the constitutionality of the law was attacked and the opinion rendered. It was held that the state could not abridge the right of the would-be citizen to

Master and
Servant.
Improper
Use of
Information
Obtained
during
Service

Naturalization,
Regulation,
State Laws

secure his papers at any time. The opinion of the court was delivered by Justice VAN SYCKEL, who, with Justice LIPPINCOTT, sat in the case. The proceeding was on mandamus, brought by Senator Daly on behalf of one Albert Rushworth, who was denied naturalization papers by the Hudson County Court of Common Pleas. The refusal by the Hudson County court was on the sole ground that Rushworth had made his application within thirty days next preceding the election of municipal officers in West Hoboken. Judge VAN SYCKEL says:

"It is entirely settled that no state can pass naturalization laws. The United States statute provides for the naturalization of aliens by application to a Circuit or District Court of the United States, or a District Court or Supreme Court or Court of record of any of the states having common law jurisdiction and a seal and clerk. The United States government has thus selected the state courts as one of its agencies to hear and act upon applications for naturalization.

"The solution of the controversy in this case, in my judgment, turns upon the question whether the state may not regulate the order of business in its own courts in relation to this subject, or refuse altogether to permit its courts to entertain applications for naturalization.

"Whether the judges of the state courts shall act on applications for naturalization or execute any other like authority, with which they may be lawfully invested, is, in my opinion, exclusively within, and subject to, the will of the legislative branch of the state government.

"My conclusion is that it is competent for the state legislature to forbid state courts altogether to entertain or act upon applications for naturalization, and, therefore, it can lay any restraint, regulation, limitation or condition upon the practice in such cases, which it may deem expedient or proper.

"No right is claimed or could be conceded on behalf of the state to interfere in any respect with the subject of naturalization in the Federal courts. This in no wise impairs the exclusive power of the United States over the subject of naturalization. The power of Congress to create inferior courts and such other agencies as it may deem necessary for the com-

plete exercise of this branch of its exclusive authority is not circumscribed."

In Philadelphia, by rule of court, the Common Pleas will only hear applications for naturalization between the first day of each December and the first day of the following July. (Rule XXVII., § 119½.)

The Supreme Court of Louisiana has adopted the prevalent doctrine on the imputation of contributory negligence, holding, in *Perez v. New Orleans City & Lake R. R. Co.*, 17 So. Rep. 869, that a passenger in a tally-ho, hired with a driver from the proprietors of a livery stable, is not so far identified with the driver as to be responsible for his acts, and chargeable with his contributory negligence, so as to exonerate a third person whose concurrent negligence causes an injury to the passenger, unless the passenger undertakes the management and direction of the driver in some manner outside of merely indicating the route he is to travel and the destination to which he wishes to be taken; and the passenger is not himself guilty of contributory negligence because of a failure to advise the driver in regard to his manner of driving.

The pardon of one convicted of perjury will, in the opinion of the Supreme Court of Pennsylvania, remove the disability to testify created by the acts of that state of 1860, March 31; P. L. 382, § 14, which provides that any one convicted of that offence "shall be forever disqualified from being a witness in any matter in controversy," and 1887, May 23; P. L. 158, § 5, which provides that such person shall not be a competent witness for any purpose, though his sentence may have been fully complied with, "unless the judgment of conviction be judicially set aside or reversed:" *Dick v. Rodgers*, 32 Atl. Rep. 424.

The litigation over the validity of the Berliner telephone

patent has been decided, on appeal, in favor of the Bell Telephone Company, by the Circuit Court of Appeals, First Circuit, in *American Bell Telephone Co. v. United States*, 68 Fed. Rep. 542, reversing 65 Fed. Rep. 86. The ground on which it was sought to cancel the Berliner patent was the delay in procuring its issuance, which was alleged to have been illegal. This point, in connection with the evidence adduced, was very carefully examined by the Court of Appeals, and the following conclusions, fatal to the success of the bill, were arrived at: (1) If an applicant is under no legal obligation to prevent delays arising from the acts or omissions of the officials of the patent office, there is no rule of law by which it can be said that, because he may have received an incidental benefit therefrom in the prolongation of his monopoly, his purpose in not more vigorously pressing his application was unlawful; since the motive will not make an act wrongful, if it is not in itself wrongful; (2) That there is no rule of diligence which requires an applicant, on pain of forfeiting his rights, to do, in the interest of the public, all the things which he has a right to do, in his own interest, for the purpose of pressing his application to a speedy issue; (3) That when a bill is filed to cancel a patent on the ground that the patentee acquiesced in delays of the patent office whereby his monopoly was in effect, prolonged, it is not for the court to say, under the circumstances of the case in hand, that he was not entitled to use his own judgment in regard to what unofficial methods he might take, or the persistency of his representations to the public officials for the purpose of speeding his application; (4) That the existence of an understanding between the patent office officials and an applicant that further action should abide the result of certain litigation involving the applicant's rights is no ground for forfeiting a patent subsequently granted, though the delay in effect operated to prolong the patentee's monopoly, when that understanding was the result of the honest and independent judgment of both parties that this course was, on the whole, the best, and consisted in nothing more than an interchange of these views; (5) That

Patents.
Delay in
Issuing.
Fraud

an error of judgment on the part of the commissioner in delaying action upon an application pending certain litigation which involved the applicant's rights, and the acquiescence of the applicant in such delay, is no ground for forfeiting the patent when issued; (6) That if even it were true that, by reason of the special circumstances of this case, the applicant was under an extraordinary duty to the public to exercise the greatest possible diligence to move the officials of the patent office to speedy action, yet the burden rested upon the United States to prove that under some practical method or methods, not employed by the patentee, the action of the patent office would have been hastened; (7) That a patent should not be canceled merely upon the ground of imputed or legal fraud arising from the delay of the patent office, acquiesced in by the applicant, when there has been no deceit, collusion, or corruption; and (8) That the issuance of a second patent to the same person for the same invention, under circumstances such that it is not clearly manifest that the inventions are the same, and that there might be a reasonable difference of opinion on the question of identity, does not involve such an excess of power on the part of the commissioner as will justify a court of equity in canceling the second patent.

According to the Supreme Court of Errors of Connecticut, one who makes regular periodical trips through certain towns, as agent for a wholesale confectioner, with a wagon loaded with packages of candy, calling on retail dealers only, taking orders and filling them from the wagon if he can, if not, booking them to be filled by a subsequent delivery, is not a peddler, within the meaning of Pub. Acts Conn. 1893, May 18, c. 121, p. 271, entitled "An act concerning sales of merchandise by itinerant peddlers," which provides for licensing persons to engage in the business of an auctioneer, peddler, or hawker, or as a traveling itinerant purchaser of second-hand goods: *State v. Fritterer*, 32 Atl. Rep. 394.

A peddler, in the popular signification of the word, is "a small retail dealer, who, carrying his merchandise with him,

travels from house to house, or from place to place, either on foot or on horse-back, or in a vehicle drawn by one or more animals, exposing his goods for sale, and selling them:" *Randolph v. Yellowstone Kit*, 83 Ala. 474. "The distinctive feature does not consist in the mode of transportation, though one of the statutory modes is essential to constitute a peddler, but in the fact that a peddler goes from house to house, or place to place, carrying his articles of merchandise with him, and concurrently sells and delivers:" *Ballou v. State*, 87 Ala. 144. "The dominant idea involved in such an occupation seems to be that the individual carries his stock in trade, consisting of small wares, on foot, or in a vehicle, about the country, offering them for sale, and then and there selling them:" *Stamford v. Fisher*, 140 N. Y. 187; S. C., 35 N. E. Rep. 500, affirming 63 Hun, 163; S. C., 17 N. Y. Suppl. 609. There are, therefore, four elements required to constitute a peddler: First, that he should have no fixed place of dealing, but should travel around from place to place; Second, that he should carry with him the wares that he offers for sale, not merely samples thereof; Third, that he should sell them at the time when he offers them, not simply enter into an executory contract for future sale; and Fourth, that he should deliver them then and there, not merely contract to deliver them in the future. If any one of these elements is constantly absent from the regular dealings of the vendor, he is not a peddler, whatever else he may be. Accordingly, no one who merely solicits orders for future delivery, or sells by sample, whether a dealer, or simply the agent of a dealer, can be considered as a peddler.

1. A storekeeper, who solicits orders and delivers groceries pursuant to such orders, but does not sell or offer for sale any goods directly from his delivery wagon, is not a peddler: *Stamford v. Fisher*, 140 N. Y. 187; S. C., 35 N. E. Rep. 500, affirming 63 Hun, 163; S. C., 17 N. Y. Suppl. 609; *Commonwealth v. Horn*, 12 Pa. C. C. 284. A merchant tailor, who exhibits samples of cloth and takes orders for suits of clothing to be made and delivered afterwards, is a manufacturer, not a peddler: *Radebaugh v. Village of Plain*

City, 28 Wkly L. Bull. 107; and no merchant who has an established place of business, and simply takes orders to be filled at that place and delivered from there, is within the definition: *Commonwealth v. Eichenberg*, 140 Pa. 158; S. C., 21 Atl. Rep. 258.

2. One who sells ranges, &c., by sample, and by taking orders for goods to be thereafter delivered and paid for, is not a peddler: *State v. Lee*, 113 N. C. 681; S. C., 18 S. E. Rep. 713. When the defendant went from house to house displaying samples carried with him in a case, and taking orders for his firm, and the firm, if it approved the orders, shipped the goods to the defendant, who delivered them, and took the cash payment, with an obligation to the firm for the balance, which was collected by the firm, it was held that the defendant was not a peddler within the statute: *State v. Hoffman*, 50 Mo. App. 585; *In re Flinn*, 57 Fed. Rep. 496; *Olney v. Todd*, 47 Ill. App. 439. Canvassing or taking orders for books, pictures, &c., is not peddling or hawking: *Cerro Gordo v. Rawlings*, 135 Ill. 36; S. C., 25 N. E. Rep. 1006, affirming 32 Ill. App. 215; *Emmons v. Lewistown*, 132 Ill. 380; S. C., 24 N. E. Rep. 58. The driver of a delivery wagon, who simply takes orders for future delivery, and then delivers the goods previously ordered, is not a peddler: *Hewson v. Inhabitants of Township of Englewood*, 55 N. J. L. 522; S. C., 27 Atl. Rep. 904. Nor is one who merely delivers goods previously sold by another: *City of Stuart v. Cunningham*, 88 Iowa, 191; S. C., 55 N. W. Rep. 311. The only recent case in contradiction of these views is *Spanish Fork City v. Mortensen*, 7 Utah, 33, which is without weight, so far as this point is concerned.

3. But if the vendor does travel from place to place, selling his goods and delivering them on the spot, he is a peddler; and as the sale takes place wholly within the limits of the state, he cannot claim that he is engaged in interstate commerce: *Commonwealth v. Gardner*, 133 Pa. 284. When the evidence showed that the defendants, who were butchers, and kept a meat-shop, sent out a delivery wagon in charge of an employer with meat to be delivered to fill orders previously

given by their customers, but at the same time were accustomed to send out in the wagon other meat, with knives for cutting it, and scales for weighing it, and that the employee in charge of the wagon was accustomed to drive from place to place soliciting business, not only from the wagon, but by going from house to house when the inmates did not see him and come out to the street, and selling to such as desired to buy from him, cutting up the meat, and weighing it out from the wagon, it was held that this constituted peddling in the employers: *City of Duluth v. Krupp*, 46 Minn. 435; S. C., 49 N. W. Rep. 235. So, a manufacturer of and dealer in proprietary medicines, who has a permanent manufactory and residence in one county, upon which he pays taxes, but who, during certain seasons of the year, attends the county fairs for the purpose of advertising and introducing his medicines, and publicly recommends them as a cure for certain diseases, is an itinerant vendor: *Snyder v. Closson*, 84 Iowa, 184; *State v. Gouss*, 85 Iowa, 21.

The Supreme Court of California, in *Lake v. Cooper*, 40 Pac. Rep. 1042, has lately held, that in a proceeding to collect assessments for street improvements, a recorded diagram, in which there is nothing to indicate the points of the compass, whereby an owner could determine, from an inspection of the diagram and assessment, where on the map his land was plotted, will not be sufficient to create a lien; and the fact that the lot may be identified by reference to the official map of the city will not cure the defect, when there is nothing in the record of the assessment referring to that map, since the court will not take judicial notice of the map, and the property owner is not chargeable with knowledge of it.

Judge THAYER, of Philadelphia, has recently rebuked the officiousness of the worthy gentlemen who would have prevented the city from sending the Liberty Bell to the Atlanta Exposition, denying the injunction prayed for, and dismissing the bill. The most pointed part of his opinion is as follows:

Relates
Municipal
Control,
Liberty Bell

"Independence Bell, or 'the Liberty Bell,' as it is commonly called from its revolutionary associations and the unconscious prophecy placed upon it when it was made, is the property of the city of Philadelphia, which acquired its title to it by a sale made by the Commonwealth in 1816 of the State House and all its grounds, buildings and appurtenances, including the bell, furniture and all other property belonging to the State House, the whole being purchased by the city for the sum of \$70,000.

"The property of the city of Philadelphia in the Liberty Bell is as absolute and as untrammelled by conditions as is the title by which any individual holds his personal property. It is the property of the corporation, and entirely under its control—as much so as the equipments of the courts, or the furniture of the Council chambers. It has been said that the city is a trustee and holds the bell as trustee for the citizens of Philadelphia, and this is true in a certain sense; indeed in the same sense the city may be said to be a trustee for all the people of the United States, for it is a moral duty which it owes to the whole country to take care of and guard safely a relic of so much interest to all the people of the United States. But this is not such a trust as trammels or interferes in any way with its absolute ownership of the bell. It may not make an unlawful or fraudulent use of it, and against such a use a court of equity might enjoin it. But to warrant such an interference the use must plainly appear to be a fraudulent or unlawful use. City Councils might be enjoined from renting a room in the City Hall for a cow stable, for that would plainly be an unlawful use of the property. So they might, in a plain case, be enjoined, I apprehend, from making an unlawful disposition of the bell.

"But can the sending of the bell under proper conditions, and properly attended and guarded, as a Pennsylvania exhibit, to the Atlanta Exposition, be regarded in any sense as an unlawful or fraudulent act?—I use the word fraudulent in the sense of misapplication or misuse of public property.—In my judgment it is preposterous to say so. The exposition at Atlanta is an event of great importance, not only to our

brethren in Georgia and the South, but to the whole country. It was regarded by the Legislature of Pennsylvania of so much importance that at its recent session it appointed commissioners, and appropriated the sum of \$38,000 to defray the expense of the Pennsylvania exhibit there. It will be participated in by most, if not all, the states, and it will be an event which can not but advance the interests of our common country, and draw closer and closer those bonds of fraternal union between the different states, which are so generally the offspring of extensive commercial intercourse.

"But this is not a question for the exercise of our discretion nor the discretion of any court, but for the discretion of the city of Philadelphia, the owner of the bell. So long as the disposition proposed to be made of it is not manifestly illegal, it is a matter absolutely within the discretion of the City Councils; and that the proposed use is not illegal I entertain no doubt whatever."

When several persons are nominated by the governor and confirmed by the senate as members of the board of trustees of state charitable institutions, and the terms of the offices to be filled by the said appointment are not of the same duration, and do not begin and end at the same time, if the nominating message to the senate is indefinite and ambiguous as to the tenure and succession of the appointees, and does not show when the term of each appointee is intended to begin and end, the records in the offices of the governor and secretary of state in regard to such appointments, as well as the commissions issued to and accepted by the appointees, are competent evidence in determining the succession and terms of those appointed: *Lease v. Clark* (Supreme Court of Kansas), 40 Pac. Rep. 1002.

The Circuit Court for the Eastern District of Michigan, in *United States Graphite Co. v. Pacific Graphite Co.*, 68 Fed. Rep. 442, has recently extended the rule that an officer of a foreign corporation temporarily within the jurisdiction for purposes not connected with the business of the corporation, cannot be validly

State
Institutions,
Trustees,
Term of Office

Writs,
Service,
Officer of
Corporation

served with process, and has held, that service of process made upon an officer of a foreign corporation, casually in the state where the service is made, but where such corporation has no place of business or agency, will not confer jurisdiction, although the officer was at the time engaged upon business of the corporation. This nullifies the decision of the state court in *Shickle, H. & H. Iron Co. v. Wiley Const. Co.*, 61 Mich. 226; S. C., 28 N. W. Rep. 77, where it was held that if the officer of the foreign corporation is within the jurisdiction, and served there, such service is valid to bind the corporation and subject it to the jurisdiction of the court, and the defense that the officer served was not on the business of the corporation cannot avail the defendant, so far as the extra-territorial effect of a judgment obtained on such service is concerned.

The rule mentioned above, that in a personal action against a foreign corporation, neither doing business within the state, nor having an agent or property therein, the service of a summons on its president, while temporarily within the jurisdiction, is not a sufficient service on the corporation, was announced by the Supreme Court of the United States, in *Goldie v. Morning News*, 156 U. S. 518; S. C., 15 Sup. Ct. Rep. 559, affirming 42 Fed. Rep. 112. The same was also held in *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. Rep. 850. The contrary was decided in *Greedy v. Southern Ice Machine Co.*, (La.), 16 So. Rep. 866.

RECENT CRITICISM OF THE FEDERAL JUDICIARY.

By HON. WILLIAM H. TAFT,
Judge of the United States Circuit Court of Appeals, Sixth Circuit.¹

Within the last four years, the Governors of five or more states have thought it proper in official messages to declare that the Federal courts have seized jurisdiction, not rightly theirs and have exercised it to the detriment of the Republic, and to urge their respective legislatures to petition Congress for remedial action to prevent future usurpation. One legislature did present a memorial to Congress reciting the grievances of the people of its state against the Federal Judiciary and asking a curtailment of the powers unlawfully assumed by them.

The principal charge against the Federal courts, which an examination of these documents discloses, is that they have flagrantly usurped jurisdiction, first, to protect corporations and perpetuate their many abuses, and second, to oppress and destroy the power of organized labor.

These charges against the Federal Judiciary have not been confined to messages from state Governors. They also come from persons, who although not holding high office, have a standing before the Bar which entitles them to respectful attention. Much of what is found in the official communications I have referred to concerning the treatment of corporations by the Federal courts, has taken form from the articles and addresses of the editor of the *AMERICAN LAW REVIEW*. This gentleman, well-known as an able and prominent law text writer, has given much attention to the Federal decisions on corporate matters and has expressed his condemnation of many of them in language that has lacked nothing in freedom, emphasis or rhetorical figure.

¹ The above address delivered by Judge Taft, at the Annual Meeting of the American Bar Association in August, and revised by him for publication, is here published with his permission.

The one judicial system to which all the members of this Association bear the same relation, is that of the United States, and when I was honored with an invitation to address them, it at once occurred to me that I might properly ask their attention to a temperate discussion of the justice of these criticisms.

I have since been oppressed with the thought that the theme might with more propriety be left to one having no official relation to the Federal courts, but circumstances have prevented any change from my original impulse. I can only hope that my recent admission to the inferior ranks of the Federal Judiciary and my humble position therein will prevent the suggestion that what is here to be said has anything in it either of a personal defence, or of a quasi official character.

The opportunity freely and publicly to criticise judicial action is of vastly more importance to the people than the immunity of courts and judges from unjust aspersions and attack. Nothing tends more to render judges careful in their decisions and anxiously solicitous to do exact justice, than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny and candid criticism of their fellow men. Such criticism is beneficial in proportion as it is fair, dispassionate, discriminating and based on a knowledge of sound legal principles. The comments made by learned text writers and by the acute editors of the various law reviews upon judicial decisions are therefore highly useful. Such critics constitute more or less impartial tribunals of professional opinion before which each judgment is made to stand or fall on its merits, and thus exert a strong influence to secure uniformity of decision.

But non-professional criticism also is by no means without its uses, even if accompanied as it often is by a direct attack upon the judicial fairness and motives of the occupants of the Bench; for if the law is but the essence of common sense, the protest of many average men may evidence a defect in a judicial conclusion though based on the nicest legal reasoning and profoundest learning. The two important elements of moral character in a judge are an earnest desire to reach a just con-

clusion and courage to enforce it. In so far as fear of public comment does not affect the courage of a judge but only spurs him on to search his conscience and to reach the result which approves itself to his inmost heart, such comment serves a useful purpose. There are few men, whether they are judges for life or for a shorter term, who do not prefer to earn and hold the respect of all, and who can not be reached and made to pause and deliberate by hostile public criticism. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance because it is the only practical and available instrument in the hands of a free people to keep such judges alive to the reasonable demands of those they serve.

On the other hand, the danger of destroying the proper influence of judicial decisions, by creating unfounded prejudices against the courts, justifies and requires that unjust attacks shall be met and answered. Courts must ultimately rest their defence upon the inherent strength of the opinions they deliver as the ground for their conclusions, and must trust to the calm and deliberate judgment of all the people as their best vindication. But the Bar has much to do with the formation of that opinion and a discussion before them may sometimes contain suggestions which bear good fruit.

Many persons whose good opinion is a high compliment regard the Federal Judiciary with so much favor that they would deprecate a consideration of the criticisms already stated, as likely to give an importance to them they do not deserve. I cannot concur in this view. I believe that in large sections of this country, there are many sincere and honest citizens who credit all that has been said against the Federal courts, and that it is of much importance that the reasons for the existence of these criticisms and their injustice be pointed out.

It is not unfair to those Governors who are the chief accusers of the Federal Judiciary to say that they knew that they were not speaking as they did, to unwilling ears. They were merely putting into language the hostile feeling of certain of their constituents toward the Federal courts and, but

for such feeling, the criticisms would hardly have been uttered. It will, therefore, in a large measure account for such criticisms, if we account for the popular sentiment they were made to satisfy.

It will be my endeavor, therefore, first to show that much, if not all, of the present hostility to the Federal courts in certain parts of the country and among certain groups of the people can be traced to causes over which those courts can exercise no control, and is necessarily due to the character of the jurisdiction with which they are vested, and not to injustice in its exercise; and, second, that the criticisms which such hostility has engendered are in themselves without foundation.

The history of the Federal courts since their beginning is full of instances where the exercise of their jurisdiction has involved them in popular controversies and has brought down upon them the bitter assaults of those unfavorably affected by their decisions. Yet the event has justified their course and shown the injustice of the attacks.

The Federal Constitution was framed to create a national government with limited powers, and to mark the line between its jurisdiction on the one hand, and that of the states and the people on the other. By virtue of its eighth article, the state courts and *a fortiori* the Federal courts, were vested with the power and charged with the duty in judicial cases arising before them, of ignoring state laws in conflict with the Federal Constitution. By necessary implication, their obedience to the fundamental law also required them to ignore Acts of Congress, which were so plainly in violation of the constitution that even the necessary and high respect due to the construction by Congress of its own powers could not give such acts the force of law.

The Federal Judiciary at once became the arister in the first great political controversy of the United States and one which is continually reappearing in various forms. The general language of the constitution required construction to apply it to judicial cases arising in the organization and maintenance of the government. The two parties which had engaged in

heated controversy over the adoption of the covenant at all, continued it over its narrow or broad interpretation. The Supreme Court in the beginning was made up largely of men whose predilection was for a liberal construction and who believed thoroughly in the national idea. This was soon manifest in their decisions, which called down upon the court the anathemas of the strict constructionists, whose great effort it thereupon became to weaken the power of the judiciary. It was attempted to control their independence by making very wide the grounds for impeachment. The great Chief Justice was constantly threatened with this fate by partisans, and the attacks upon his alleged usurpations were frequent and fierce. Jefferson's severe words concerning the Federal Judiciary, now so often quoted by their latter day critics, were written about 1820 as the result of the decision, in *Cohens v. Virginia*, reaffirming the power of the Supreme Court of the United States to reverse the decision of the Supreme Court of a state on the validity of a state law under the Federal Constitution. It is not surprising that he who had inspired the Kentucky resolutions of 1798, declaring the right of a state to decline compliance with a Federal law, deemed by it to be in conflict with the fundamental compact, should regard the Federalist Supreme Court, which itself asserted the right finally to decide such a question, to be "a thief of jurisdiction."

Upon political questions, and such are those arising in the construction of a political charter, there always have been and always will be differences of opinion. There is frequently no absolute standard, even a century after, in deciding the abstract right of them. We must be content to abide the result reached by the verdict and acquiescence of the people whose interests were involved. Before this tribunal, the position of John Marshall and his associates on the Supreme Bench has been vindicated, and the criticisms of Thomas Jefferson have been refuted.

Beginning then as arbiters in a political conflict, and wielding similar powers until to-day, the Federal Judiciary have never enjoyed immunity from hostile attack upon their con-

duct or their motives. The great controversy over the fugitive slave law needs no recounting here. In the eyes of the abolitionists, the Federal courts and their marshals were instruments of hell in enforcing the law, and yet there could not be the slightest doubt that such a jurisdiction was plainly within the constitution. The change of feeling toward the Federal courts because of the change in their jurisdiction with respect to the negro race, affords an apt illustration of how mere jurisdiction may affect the popular feeling toward a court. Before the war, the Southern people had not looked with disfavor upon courts, which did so much to preserve their property, while at the same time the abolitionists regarded them with aversion. After the war, when for the protection of the negro in his electoral and civil rights, the election and civil rights bills were passed, and their enforcement was given to the Federal courts, they became at the same time the objects of hatred and condemnation at the South and the great reliance of those who had been abolitionists at the North. Now that both parties have wisely decided to let the election problem work itself out, and to await the local solution, which the results of fraud and violence in elections will compel, the feeling of hostility at the South against the Federal Judiciary has greatly abated.

This is but one of many historical instances showing how the Federal courts may be subjected to the most severe criticism without just grounds, merely because of the character of their jurisdiction. I come now to review the reasons why their mere jurisdiction has created a deep impression in many parts of the country that the evils due to corporations are fostered by them.

The last two generations have witnessed a marvellous material development. It has been effected by the organization and enforced co-operation of simple elements that for a long time previous had been separately used. The organization of powerful machines or of delicate devices by which the producing power of one man was increased fifty or one hundredfold was, however, not the only step in this great progress. The aim of all material civilization in its hard contest with nature was the reduction of the cost of production, because thereby

each man's day's work netted him more of the comforts of life. Within the limits of efficient administration, the larger the amount to be produced at one time and under one management, the less the expense per unit. Therefore, the aggregation of capital, the other essential element with labor in producing anything, became an obvious means of securing economy in the manufacture of everything. Corporations had long been known as convenient commercial instruments for securing and wielding efficiently such aggregations of capital. Charters were at first conferred by special act upon particular individuals and with varying powers, but so great became the advantage of incorporation with the facility afforded for managing great enterprises, and the limitation of the liability of investors, that it was deemed wise in this country in order to prevent favoritism, to create corporations by general laws and thus to afford to all who wished it, the opportunity of assuming a corporate character in accordance therewith. The result was a great increase in the number of the corporations and the assumption of the corporate form by seven-eighths of the active capital of the country. The great saving in the cost of production brought about by mechanical inventions and the organization of capital worked incalculable benefit to the public, but the necessary price of it under our system of free right of contract and inviolate rights of private property was a division of the profit between those who were to consume the product and those whose minds conceived and whose hands executed the work of production. The total wealth of the whole country was thus enormously increased, but of the increase more was necessarily accumulated in some hands than others. In the general prosperity caused by the revolution in methods of production, captains of industry amassed fabulous fortunes, and the aggregations of capital under corporate management became so great as to stagger the imagination. In the mad rush for money which previous successes had stimulated, it is not to be wondered at that some of the accumulated wealth was corruptly used to secure undue business advantages from legislative and executive sources, and that many of the political agencies of the people

became tainted. The impersonal character of corporations afforded a freedom from that restraint in the use of money for political corruption, which is often present when the would-be briber is an individual. Men of good repute with complacence and intentional ignorance acquiesced in the use of corporate funds to buy legislators and councilmen in the corporate interest when they would not wish or dare to adopt such methods in their individual business. The enormous increase in corporate wealth furnished the means of corruption, and the prospect of ill-gotten gains attracted the dishonest trickster into politics and debauched the weak, while the honest and courageous were often driven into private life. The Genie of corruption in politics, which the corporations called up has lived to plague them, and, although many great companies have secured all they wish from legislative bodies, they are regarded by the political blackmailers as fair game, and the corruption fund is still maintained to prevent oppression. The people not unjustly have charged these public evils to the management of corporations.

Another evil has been the injustice done to the real owners of corporate property by the reckless and dishonest management of its nominal owners. The great liberality of the general laws for the formation of corporations, and the entire failure to exercise any stringent visitorial powers over them, have enabled the active promoters and managers of large enterprises carried on at a distance from the homes of the real owners to increase the corporate indebtedness and capital stock so far beyond any fair valuation of their property as to put the entire control of it in the hands of the holders of worthless stock, who have nothing at stake in the corporate success. The real owners, the bondholders, are at the mercy of this irresponsible management till insolvency comes. The reckless business methods, which such an irresponsibility and lack of supervision invite, create an unhealthy and feverish competition in every market, wholly unrestrained by the natural caution which the real owner of a business must feel. The concern is kept going with no hope of legitimate profit, but simply to pay large salaries, or to favor unduly

some other enterprise in which the managers have a real interest.

Another reason for popular distrust of corporate methods is the use by corporations of great amounts of capital to monopolize and control particular industries. It is my sincere belief that no such control or monopoly can be maintained permanently, unless it is buttressed by positive legislation giving an undue advantage over the public and competitors. Of course, by close business methods and by improving all the economical advantages which the manufacture of a commodity on an enormous scale affords, the cost of production may be so reduced as to discourage competition on a smaller scale, but, unless the fear of it performs the same useful office for the benefit of the public by continuing the lowest profitable prices, actual competition will certainly appear. Whatever the fate such trusts may ultimately have, it has often happened that in their formation and early history, the plan adopted has been the forced buying out of every competitor or his ruin by underselling him at heavy loss, so as to put the public and the market for a time at least at the mercy of one greedy corporate concern. Such methods and such a result naturally fill the people with anxious fears and a hostile feeling toward aggregations of corporate wealth.

In spite of these well-known evils, nothing can be clearer to a calm, intelligent thinker than that under conditions of modern society, corporations are indispensable both to the further material progress of this country and to the maintenance of that we have enjoyed. The evils must be remedied, but not by destroying one of the greatest instruments for good that social man has devised. Nevertheless, so strong has the hostility to corporations become, especially in certain of the Southern and Western states where the agricultural community is large, life is hard and wealth is rare, that any plan which can be contrived to diminish the property of corporations, or to cripple their efficiency seems to meet with favor. The feeling is especially directed against the railway corporations, although without their aid and presence, these very communities would be helpless and poor, indeed.

The last decade in Europe has been prolific of doctrines and theories for the amelioration of the human race by the abolition of private property and private capital, by the vesting of all the means of production in the government for the benefit of all the people, and by the distribution of the product according to fixed standards of merit. While socialism has not obtained much of a foothold in this country as such, even in those sections already referred to, schemes which are necessarily socialistic in their nature are accepted planks in the platform of a large political party. The underlying principle of such schemes is that it is the duty of the Government to equalize the inequalities which the rights of free contract and private property have brought about, and by enormous outlay derived as far as possible from the rich, to afford occupation and sustenance to the poor. However disguised such plans of social and governmental reform are, they find their support in the willingness of their advocates to transfer without any compensation from one who has acquired, a large part of his acquisition to those who have been less prudent, energetic and fortunate. This of course involves confiscation and the destruction of the principle of private property.

Under the fourteenth amendment the question whether legislation and state action deprive any person of his property without due process of law has become a Federal one, and by the Act of 1875, it is cognizable by the Circuit Courts of the United States.

The prejudices above adverted to have led to much legislation hostile to corporations both resident and non-resident. It takes the form of discriminating taxation, of the regulation of rates to be charged by those companies engaged in quasi public business, and sometimes of the direct deprivation of vested rights. In all such cases resort is at once had to the inferior Federal courts by the corporations injuriously affected, to test the validity of the state's action, and it not infrequently happens that it becomes the duty of such courts to declare void the legislation involved and to enjoin state officers from seizing or injuring the property of corporations under its provisions. Such a decision in a corporation-hating

community at once tends to mark the Federal courts as friends and protectors of corporations.

The repeated efforts of different state legislatures to impose restrictions upon interstate commerce to secure some apparent advantage to their own constituents, evidence the profound wisdom of the framers of the constitution in vesting complete control thereof in the National Government; but the tribunals whose jurisdiction is constantly invoked judicially to declare void all such legislation, do not for the time commend themselves to the favor either of those who urged its passage or of those who were to profit by its operation, and the fact that the complainant in such litigation is frequently a railroad or transportation company, only confirms the view of the undue favor of these courts to such litigants.

The jurisdiction of the Federal Judiciary does not end with the enforcement of national laws in the interest of the whole country against the temporary interest of a part. They are also required to administer justice between the citizens of different states. It goes without saying, that this judicial power was given to prevent the possibility of injustice from local prejudice, and not because in every case it was supposed to exist. The entire jurisdiction rests on the exceptional instances, for in a great majority of cases the same results would certainly be reached in the courts of the state as in the Federal courts. But in those courts or states where there is real danger from prejudice against a stranger, the same cause which is likely to obstruct justice for the foreign suitor creates a local feeling of resentment against the tribunal established to defeat its effect. The capital invested in great enterprises in the South and West is owned in the East or abroad, and the corporations which use it are therefore frequently organized in a different state from that in which the investment is made. Such companies all carry their litigation into the Federal courts on the ground of diverse citizenship with the opposing party, and, in view of the deep-seated prejudice entertained against them by the local population, it is not surprising that they do. That in most, if not in all cases, the feeling that prompts this avoidance of the state courts does great injustice

to the state judiciary is undoubtedly true. In jury trials, however, the fear of injustice from local prejudice is certainly sometimes justified. In these same states where the narrow provincial spirit is strong and local prejudices exist, there is deep fear of the abuse of judicial power, and the legislation of the state is directed to minimizing the influence and control of the judge over the action and deliberation of the jury. The extent to which this is carried was clearly set forth in an interesting article read before this association by Mr. Justice Brown some years ago. The slightest circumstance, although furnishing but a scintilla of evidence to support the contention of either party, requires the submission of the case to the jury. The office of a judge is reduced to that of a mere moderator of the trial. He is only permitted to lay down a few general principles of law in advance of the argument, while the application of them to the facts of the case and conflicting evidence is really committed to the zeal of contending counsel. The tendency of such procedure is to leave to the unrestrained impulses of the jury the settlement of all the issues of the case. Though the injustice likely to result to corporations from this procedure is manifest, the people of a locality where local prejudice exists have come to think that they have a vested right to the chances of success which it gives them in a suit against such opponents. When, therefore, in controversies with corporations of other states, they are carried before a court in which the jury are not their friends and neighbors, and in which the power is given to the judge to direct a verdict when the evidence for either party is so slight that a contrary verdict must be set aside, to comment on the evidence, to apply the law thereto, and to make plain, if need be, what the legal sophistries of counsel and their inaccurate statements of the evidence may have obscured, they feel that they are in a tribunal which they should avoid and which the corporations should naturally seek. The constant struggle of most corporations to avoid state tribunals in the sections of the country referred to, and to secure a Federal forum, even though it is followed by only limited success in the result of the litigation, is chiefly the cause for the popular impression in those states that the

Federal courts are the friends of corporations and protectors of their abuses.

Those abuses, however, really find their chief cause in political corruption, which it is wholly beyond the power of the Federal courts to prevent or eradicate. Too frequently the popular impulse is to remedy or punish the evil by giving judgment against the great corporations in every case, no matter what the particular issues or facts are, on the ground that the corporation has probably increased its capital or attained its success by corrupt methods. It is hardly necessary to point out that this mode of punishment by forfeiture and chance distribution cannot be countenanced in a court of justice, however meritorious the cause of complaint upon which it is founded.

Corporate corruption cannot be directly punished in the Federal courts, because the bribery of which many corporations are guilty is most difficult of legal proof and crimes of this character are usually committed against the state, so that Federal courts have no cognizance of them. It has been wisely settled by the adjudication of all courts, state and Federal, that the evils resulting from vesting in courts the power to set aside otherwise lawful acts of the legislature for alleged corruption in their passage, would exceed even the wrong done by such legislation, because of the uncertainty it would give to the binding effect of all laws and the overwhelming influence such power to inquire into legislative motives would give the judicial branch of the government in respect of all legislative action.

The abuses which too liberal charters and insufficient visitatorial power permit, are either for the state legislatures or for the state executive and courts, by *quo warranto*, to correct and remedy. State laws, which should forbid the issue of stock or the issue of bonds by any corporation until after an examination by a state board of supervision into the affairs of the company and a certificate that the assets justify it, would do much in this direction. The Federal courts can do nothing to prevent such abuses, and their action is not usually invoked until the evil is done, and only a bankrupt estate is left to administer.

The combinations known as trusts are now before the state courts, and I have no doubt from their decisions that legislation which experience will suggest, both by way of supervision over corporations and by criminal laws, will suppress much of their evil methods. It is settled and rightly settled, I submit, that the national government can do nothing in this direction, except where such trusts are for the purpose of directly controlling interstate commerce.

The main public evil of corporate growth, the corruption of politics, must be reformed by the people and not by the courts. Courts are but conservators; they cannot effect great social or political changes. Corporations there must be if we would progress; accumulation of wealth there will be if private property continues the keystone of our society; the temptation to use money to corrupt legislatures and other political agencies will remain potent as long as undue privilege for corporations can be thus secured. The only real remedy is in the purification of the politics of the country, and the selection of incorruptible public servants. Dark as the prospect sometimes seems for such a change, we must not and need not despair. Public opinion is sound, the great heart of the American people is honest, and slowly but surely the light is breaking in on them. The adoption of civil service reform in Federal, state and municipal government is as certain to come as the nation is to live, and with its complete establishment the end of those indispensable assistants of successful political corruption, the machine and its boss, will cease to be. The mad rush for wealth, the fevered condition of business and the opportunity for making sudden fortunes have taken the attention of the more intelligent people from politics and made them blind or callous to political abuses. With their greater ability to see and appreciate the dangers of the republic, their share of the blame for present conditions is greater. But there are many signs of a quickened public conscience and of a willingness on the part of the intelligent and the pure to interest themselves in politics for their country's good.

The present successful use of corrupt methods by corpora-

tions is directly due to the neglect of the people to exercise the eternal watchfulness which is the price of pure government ; but those whose interest it is to secure popular support and who are willing to secure it by appeals to prejudice do not tell the people unpleasant truths, and are glad to find a scape-goat for the people's sins in the Federal Judiciary. It well rounds a rhetorical period to point to the Federal Judiciary as an irresponsible and irremovable body, wholly out of touch with the people and conniving at corporate abuses.

To an impartial observer it must seem remarkable that judges should conceive a love for soulless corporations and unduly favor them. Living as most of these judges do on their salaries and deriving no profit from corporate investments, they would seem to find little in their lives to blind them to the injustice of any claim or defence which a wealthy corporation may make.

If it were conceded that greed of power is an incentive so strong that Federal judges have yielded to it and have extended their jurisdiction over corporations beyond the lines marked by the constitution and the laws, this is far from establishing that justice has not been meted out to corporate suitors with impartial hand. The fact is, that when we come to examine in detail the charges against the Federal courts, the burden of them is that they have assumed jurisdiction over corporate litigation without constitutional and legal right, and not that, in the hearing on the merits, corporations have been unduly favored. The latter is always assumed as a granted premise when the former is deemed to be established.

Having pointed out some of the reasons why the jurisdiction of the Federal courts in respect to corporations, be it exercised never so impartially, must under existing conditions arouse deep prejudice against them, and call forth severe assaults upon their conduct and motives, I come now to examine more in detail the charges which have been made by those who attempt specifications.

The first is that the Supreme Court in holding, in the Dartmouth College case, the legislative charter of a corporation to be a contract, the repeal of which was the impairment of its

obligation and was inhibited by the Federal constitution, committed a fundamental error, induced thereto by greed of jurisdiction, and thus furnished to corporations the means of maintaining and enjoying corruptly purchased privileges. I do not propose to discuss this much criticised case because it was decided in 1820, and has now nothing but an historical interest; for no charter has been granted for years which does not contain a clause permitting its repeal or amendment, and a court could hardly give a wider scope to such a reservation clause in favor of the state's power than that which the Supreme Court of the United States gave in the *Greenwood Freight Company* case. With reference to the accusation that it was greed of jurisdiction which induced the court to hold that the revocation of a grant by a state was the impairment of a contract and so within the Federal constitution, it should be said that the people of the United States, instead of condemning this assumption of jurisdiction have by subsequent amendment expressly extended the Federal Judicial power to the cognizance of state aggression upon all vested rights whether resting in grant, contract or otherwise.

And this suggests the charge against the Supreme Court that it improperly seized additional corporate jurisdiction in its holding that the fourteenth amendment forbidding a state to deprive any person of life, liberty or property without due process of law protects the property of corporations as well as that of natural persons. It is difficult to see how any other result could have been reached. For, even if artificial persons are not referred to in the amendment, natural persons necessarily have vested rights in the property of corporations. It is said that the construction should have been limited so as to exclude corporations because the moving cause was only to give national protection to a newly freed race. In the light of the general language of the amendment, this would have been a narrow construction indeed, and one which nothing could have justified except the conviction now firmly held and declared in some quarters, that Federal jurisdiction to preserve any rights, even those declared in *Magna Charta*, is an unmitigated evil to be avoided by interpretation however strained.

And yet the Supreme Court is attacked with invective and epithet by the same critics for refusing to hold in the Sugar Trust case that the power to regulate interstate commerce includes within it the power to inhibit the purchase by one company of substantially all the plants for refining sugar in this country with the purpose of controlling its sugar markets. To extend the Federal regulation of interstate commerce to that of the purchase of the means of producing a commodity which, when produced, is to be the subject of commerce both state and interstate, requires a construction of the interstate commerce clause so broad that, if accepted, it would have been difficult to fix a limit beyond which Congress might not go in its control of mercantile business and manufacturing in every community. It would have seemed to give some ground for the charge so often made that, through Federal judicial decisions, rights of the states are being absorbed in the national government.

As I have already said, the burden of the specifications against the Federal Judiciary is not that they unduly favor corporations in the hearing of cases, but that they have improperly given corporations opportunities to avoid the state courts by resorting to the Federal courts. Hence the decisions of the Supreme Court, by which corporations organized in one state and suing or being sued in another are permitted to select the Federal courts as a forum, have been the subject of the severest animadversion, and the judges rendering the decisions are charged with having been consciously guilty of flagrant usurpation and with intentional violation of the law and the constitution. When corporations first appeared in the Federal courts, it was held that a corporation was not a citizen within the meaning of the judiciary act or the constitution, and that Federal jurisdiction asserted on the ground of diverse citizenship, in a cause to which a corporation was a party, must depend on the citizenship of the stockholders or members of the corporation. As it had also been ruled that the words of the judiciary act giving circuit courts jurisdiction in every suit between a citizen of the state where it was brought, and the citizen of another state only included suits where all

the parties on one side were of different citizenship from that of all of those on the other, the result was that no corporation could resort to a Federal court unless all its stockholders were citizens of another state from that in which the suit was brought, and the ownership of one share by a resident of the same state with that of the opposing party ousted the jurisdiction. And this, the Supreme Court held until 1844. In that year the question arose again, and the court held that, for purposes of Federal jurisdiction, a corporation was a citizen of the state which created it, and soon thereafter laid down the doctrine, always followed since, that the members of a corporation are to be conclusively presumed to be citizens of the state of its creation. This conclusive presumption was a fiction, adopted, as Mr. Justice BRADLEY has explained, to avoid the difficulty and injustice caused by the frequent appearance in such cases of a single resident stockholder. It was in effect a changed construction of the judiciary act for reasons which had not forcibly presented themselves to the court when the question first arose. It was certainly true that when corporations, organized in other states than that where suit was brought, appeared in litigation, they represented members, a great majority of whom were either citizens of other states or aliens. If any local prejudice was likely to have effect against a non-resident natural person, it certainly would have effect against a corporation from another state, and the ownership of a few shares of its stock by a resident would not obviate it. The result reached by the decisions was quite within the constitutional grant of Federal judicial power, for that covers all controversies between citizens of different states, and it is immaterial whether in such controversies are also involved, on both sides, citizens of the same state. There was such a real difference for the practical purposes of a trial and the bearing of local prejudice upon it between a suit by or against a foreign corporate body with one or more resident stockholders, whose identity was lost in that of the corporate party litigant, and a suit by or against parties to the record who were natural persons, some of them resident and others non-residents, that the exception made in resp

to corporations in the established construction of the judiciary act would seem sound and reasonable.

The holding that a foreign or non-resident corporation must be excluded from resort to a Federal forum, because it had one or more resident stockholders would practically deprive the owners of nearly all foreign capital to be invested in the newer states of the Union of any opportunity to sue or defend in the Federal courts, because, in the nature of things, their capital must assume a corporate form, and in companies with thousands of shares of capital stock transferable without restriction, a share or two, at least, would be sure to find its way into the possession of a resident owner. And yet the reason for the constitutional provision applied more strongly to such corporate investments than to those of non-resident natural persons.

The ruling was directly in the interest of the new states who were thirsting for foreign capital, because it removed one of the hindrances to its coming. It was, therefore, exactly in accord with the intention of the constitution. It gives but a contracted view of the purpose of the framers of that instrument in providing a tribunal between citizens of different states, which was equally related to both, to regard it solely from the standpoint of the non-resident and as intended only to secure a benefit for him. It is crediting them with a much more statesmanlike object to say, that while the provision was, of course, intended to avoid actual injustice from local prejudice, its more especial purpose was to allay the fears of such injustice in the minds of those whose material aid was necessary in developing the commercial intercourse between the states, and thus to induce such intercourse and the investment of capital owned by citizens of one state in another. In this light, it is only one of several provisions of the constitution intended to prevent unnecessary and prejudiced restraints upon interstate commerce, and it confers more benefit upon those against whose prejudice it is intended as a shield than upon those whose interests are directly protected.

The decisions under discussion were made by the Supreme Court in the days of Chief Justice TANEY, and with his con-

currence at a time when its members are now thought to have been inclined toward a narrower construction of the constitution and Federal jurisdiction and powers than their predecessors.

Moreover, the people of the United States for fifty years have acquiesced in this holding. In the last half century, it has always been within the power of Congress by two lines of legislation to reverse it, and, although, during that period, the party of strict construction and state's rights was for years in control of Congress, and the judiciary act was four times substantially amended, the decisions remain the law of the land. When it requires a constitutional amendment to correct or restrain an unwarranted assumption of power by a court, the machinery for securing it is so cumbersome that the failure by this means to restrain the court is not a conclusive argument in favor of the people's acquiescence in the court's assertion of jurisdiction. But where, as in the present case, the issue was merely one of construing a statute, the failure of Congress for half a century to amend or overrule the construction given is as strong an argument as can be adduced to justify the action of the court, and would, in this case, seem to be the best possible refutation of the severe charge that the Judges, who made these decisions, were guilty of flagrant and intentional usurpation.

If it is true that citizens of one state organize corporations under the laws of another state to do business in the former state, and thereby carry controversies with their fellow citizens into the Federal courts, this is an abuse which should be remedied by Congress as other frauds upon the jurisdiction have been provided against.

The Federal courts have also been severely arraigned for undue amplification of their powers in the matter of receivers of railroad companies, due as it is charged to their leaning toward such corporations and a desire to protect them. This count of the general indictment against the Federal Judiciary is more fully and elaborately treated in a memorial presented to Congress by the Legislature of South Carolina, than anywhere else. The occasion for the protest was the commit-

ments for contempt by the Circuit Court of the United States sitting in South Carolina of certain state officers. In one case the contemnors were taxing officers who, though they knew the property to be in the hands of the receiver of the Federal court, without any application to the court, seized it for taxes. In the other case, a constable without search warrant broke into the warehouse of a railroad in the hands of the court's receiver and seized a cask of liquor on the ground that it had been transported into the state contrary to the provisions of the state dispensary law. The cask had been imported before the dispensary law went into effect and had been held by the receiver because the whereabouts of the consignee could not be discovered. The circumstances in each of these cases rather indicate a desire on the part of the state authorities to seek a conflict with the Federal court than an aggressive and domineering spirit in the latter. When the state authorities in a decent and orderly way subsequently applied to the court for an order upon the receiver to pay the taxes, the objections of the receiver were heard and overruled and an order made upon him to pay.

The deep spirit of distrust of the Federal courts in which the memorial is written may be inferred from one of its concluding sentences, in which the Federal courts of equity are referred to as "having been degraded to their present position of being feared by the patriotic and avoided by the honest." We are permitted to conjecture that the memorialists were not wholly unbiassed in discussing the decisions of the Federal courts and their integrity and standing, when we read the statement in the inaugural address of the present Governor of the state, who was one of the signers of the memorial, that he and the men to whom he was speaking in this year of grace, 1895, were, "South Carolinians by birth and choice, Southerners on principle and Americans by force of circumstances."

The main purpose of the memorial was to show that the practice of Federal courts of equity in appointing receivers to operate railroads is a usurpation of authority wholly without warrant in the English High Court of Chancery, by the pro-

cedure in which, the scope of equitable remedies in the Federal courts is usually governed. To establish this, the memorialists relied chiefly on the judgment of Lord Cairns in the Court of Chancery appeals in the case of *Gardner v. the London Chatham & Dover Company*, in which the order of the Vice-Chancellor appointing a manager of the defendant railway on the application of a mortgagee of the railway tolls was reversed. The judgment was placed upon two grounds, first, that the mortgage gave no right of sale and liquidation, so that the order was really for a permanent management of a going business, while the practices in courts of equity justified the appointment of receivers only until a sale and liquidation; and, second, that by the charter of the company the franchises were personal and non-assignable, and could not be exercised by a receiver. The first reason has little or no application to the vast majority of cases, in which railroad receivers have been appointed in this country, for generally the remedy sought has been a sale and liquidation, and the receiver has thus been appointed to serve only until the sale. The second ground of the judgment does not relate to the competency of a court of equity to manage a railroad or other going business through an agent, *pendente lite*, but only to the assignability of franchises, and it furnishes as little support as the first ground to the claims of the memorial. The power to mortgage conferred by statute on railway companies in this country usually contains express authority to mortgage both the railroad and the franchises to operate it. The necessary implications from this are the right to sell the franchises with the road at a foreclosure sale, and the power of the court in which foreclosure proceedings are had, to preserve the property with its assignable franchises by temporary custody and operation of the road under such franchises pending the sale.

By reference to Lord Justice BAGGALLAY's judgment in the case of the *Manchester & Milford Ry. Co.*, 14 Ch. D. 657, it appears that the result in Gardner's Case was a surprise to the profession, and was in conflict with the practice of appointing managers in such cases which had been in vogue in the

chancery courts of England for ten years previous, and which had had the sanction of so great a chancery lawyer as Lord HATHERLY. Moreover, no sooner was the decision announced in the Gardner Case, than Parliament passed an act expressly authorizing the appointment of railroad managers by the court of chancery, showing that, in the opinion of Parliament, jurisdiction to manage railroads, pending litigation over them, by officers of the court was a power that courts of equity should have, if they did not already have it.

The charge of usurpation in the appointment of receivers becomes still less maintainable when we consider the history of receiverships in this country. Gardner's Case was decided in 1866. As much as ten years before this, the Supreme Court of the United States in *Covington Drawbridge Co. v. Shepard*, 21 How. 112, had referred to the practice in the English court of chancery to order a receiver to be appointed to manage railways and other corporate property, to take the proceeds of the franchises and to apply them to pay the creditors filing the bill, and had approved and adopted it in the case of a bridge company. Thereafter receivers were appointed for railways and it had become a settled practice not only in the Federal courts but in state courts when Gardner's Case was decided. Even if that case cannot be reconciled with the practice of appointing receivers under the conditions existing in this country, as I have attempted to show it can be, there would still seem to be no binding or jurisdictional obligation on courts of the United States to reverse their settled procedure of ten years standing based on English precedent to accord with a new and unexpected ruling in the English courts, and one the effect of which was immediately done away with by an act of Parliament restoring the old practice.

The appointment of receivers to operate railroads pending suits in foreclosure and creditor's bills, instead of being an abuse of authority by the Federal courts was a most commendable use of an ordinary equitable means of preserving the *status quo* with respect to a new kind of property and a pressing emergency. Generally no one but the parties are

interested in preserving the subject matter of the suit as a going concern till it can be sold, but in the case of a railroad the public are even more interested than the parties in having this done. It is mentioned in the South Carolina memorial as a measure of the abuse of Federal jurisdiction in this regard that one-fifth of the railroad mileage in the United States is in the hands of Federal court receivers. Considering the severity of the times and the suicidal cutting of rates by railroad companies for the purpose of securing business, I do not know that this proportion unfairly indicates the number of embarrassed and bankrupt roads in this country, but it is hard to see why it is an argument against the appointment of receivers to operate them. The disastrous consequences to the whole country, were these great arteries of the Nation to cease to flow, can hardly be overstated; and yet, unless in the course of liquidation sale and reorganization, they could, when insolvent, be withdrawn from liability to seizure and dismemberment by ordinary executions in the various jurisdictions which they traverse, their operation would become impossible. The ordinary insolvent laws of each state, even if their procedure had been at all adapted to the running of railroads, as it was not, would have supplied in such case but a poor substitute for the present receivership. Most railroads are to-day interstate, and the advantage of an *ad interim* management under practically the same jurisdiction on both sides of state lines is apparent. In the absence of statutory provision for such an exigency, the flexible procedure of a court of equity is fitted to meet it, and although the remedy was adopted soon after the building of railroads, more than forty years ago, and has been applied with increasing frequency ever since, it has not been deemed necessary by Congress or state legislatures to provide any other means for bridging the undoubted difficulties presented by the insolvency of railroad companies.

One of the greatest objections urged to receiverships in the South Carolina memorial is that it removes the railroad property from local jurisdictions. But this objection would be incident to any imaginable temporary management of the railroad pending proceedings to sell and distribute proceeds. The

injury to the sovereignty of the state involved in the requirement that its taxing officers shall make application to the Federal court having custody of property for an order for the payment of the taxes due upon it, instead of violently taking it out of the court's possession, is one that must be charged to the Constitution of the United States, to the supremacy of the Federal jurisdiction where it conflicts with that of the state therein declared, and to the circumstances by the force of which South Carolina is still in this country. The charge that in appointing receivers the Federal courts abolish the right of trial by jury in great stretches of country is untrue, for by the statute of 1887 suit may be brought against a receiver without leave of court, and this permits a suit at law with all its incidents. The fear entertained that the management by the Federal courts of property worth \$1,300,000,000, without responsibility, would lead to malversation of funds, and corruption does not seem to be justified by the history of Federal receiverships. The fact is, that no possible system of managing railroads could be better adapted to a summary investigation of the details of the management than that by a court of equity in which the court will always and at once entertain complaints by anyone in interest against its receiver and examine the facts upon which they rest. This may account, in part, for the very few instances of official corruption among Federal receivers.

On the other hand, if any other and better way can be devised for the temporary management of insolvent railroads pending their sale, it may be conceded that there are substantial reasons for relieving Federal courts of equity from the duty. The business has grown to such an extent that regular judicial labors are much interfered with by the consideration of mere questions of railroad management. Unpleasant public controversies often follow in the wake of receiverships, having a tendency to put the court in the attitude of a party. The more or less complete dependence of the court upon the receivers in matters of policy and the possibility that this confidence may be misplaced make the jurisdiction an irksome one. The immunity enjoyed by a receiver and a railroad in his charge from ordin-

ary process *in rem* is very attractive to struggling railroad owners and friendly litigation is often begun merely to secure a receiver and tide over a stringency in the interest of all concerned. With no one in interest to oppose the appointment or to move its discharge after it is made, a receiver is secured and he is continued as long as all parties do not object, and do not press the cause to final disposition. Courts usually have so much to attend to that they do not and cannot investigate the weight or validity of reasons for delay in causes when not brought to their attention by complaint of some of the parties. Meantime the receivership is maintained and the irritation incident to the withdrawal of the railroad from local jurisdictions is continued. The work of managing the road is saddled upon the court pending the coming of a time when a reorganization may be agreed upon or a better price obtained. I sympathize heartily with every effort to impose a practical limitation upon the duration of receiverships. The use of the courts as a harbor of refuge from creditors during a financial storm may be abused, and doubtless has been. The temptation to this resort is greatly increased if, as is too often the practice, the controlling officer of the company is continued in the management as receiver. The patronage incident to the jurisdiction is one of its evils. Recognizing this and wishing to avoid a disagreeable controversy over place, courts usually acquiesce in the appointment of a person recommended by the parties, who is not infrequently the president or manager of the company, and whose failure to oppose the receivership, it may be, has been secured by such a recommendation. Consent applications for receiverships would be much less common if it were provided by statute that, wherever a case is made on preliminary application for the immediate appointment of a receiver, the clerk or marshal should act as temporary receiver for thirty days, with a fixed per diem compensation, at which time a permanent receiver, not an officer of the court, should be selected by the court after full notice to all parties, and that no one connected with the previous management of the railroad or interested in its bonds or stock should be eligible, even with consent of the parties. It has some

times seemed to me that by virtue of the power to pass a bankrupt law, and to regulate interstate commerce, a national bureau for the sale of the assets of insolvent interstate railroads and their *ad interim* operation might be established, something like that now provided for National banks, and that the executive head of such a bureau might be better able to speed the sale of the railroads and shorten the duration of their official management than courts. When, however, one attempts to formulate a system which shall have the flexibility of the present procedure and its adaptability for preserving the real *status quo* during the adjustment, one is obliged to admit that the court management *pendente lite* has advantages over any other, anomalous in some respects as it may seem. Probably this explains the failure of Congress or the state legislatures to provide any other system, and even the zealous South Carolina memorialists in their recommendation to Congress were unable to point out a better way than court receiverships with a few minor limitations. In any event, until some new way is devised for the temporary operation of railroads, pending insolvency or foreclosure and sale, courts must assume it, and it ill becomes any one to criticise their action in doing so, and to charge it to their greed of power, when any other course would result in disastrous consequences to the parties in interest and the country at large.

On the whole, when the charges made against Federal courts of favoritism toward corporations are stripped of their rhetoric and epithet, and the specific instances upon which the charges are founded are reviewed, it appears that the action of the courts complained of was not only reasonable but rested on precedents established decades ago and fully acquiesced in since, and that the real ground of the complaint is that the constitutional and statutory jurisdiction of the Federal courts is of such a character that it is frequently invoked by corporations to avoid some of the manifest injustice which a justifiable hostility to the corrupt methods of many of them inclines legislatures and juries and others to inflict upon all of them.

We come finally to the relation of the Federal courts to

organized labor. The capitalist and laborer share the profit of production. The more capital in active employment, the more work there is to do, and the more work there is to do, the more laborers are needed. The greater need of laborers, the better their pay per man. It is clearly in the interest of those who work that capital shall increase more rapidly than they do. Everything, therefore, having a legitimate tendency to increase the accumulation of wealth and its use for production will give each workingman a larger share of the joint result of capital and labor, and it is in a large measure, because this country has grown more rapidly in capital than in population, that wages have steadily increased. But while it is in the common interest of labor and capital to increase the fruits of production, yet in determining the share of each their interests are plainly opposed. Though the law of supply and demand will doubtless, in the end, be the most potent influence in fixing this division, yet during the gradual adjustment to the changing markets and the varying financial conditions, capital will surely have the advantage, unless labor takes united action. During the betterment of business conditions, organized labor, if acting with reasonable discretion, can secure much greater promptness in the advance of wages, than if it were left to the slower operation of natural laws and, in the same way, as hard times come on, the too eager employer may be restrained from undue haste in reducing wages. The organization of capital into corporations with the position of advantage, which this gave in a dispute with single laborers over wages, made it absolutely necessary for labor to unite to maintain itself. For instance, how could workingmen, dependent on each day's wages for living, dare to take a stand, which might leave them without employment if they had not by small assessments accumulated a common fund for their support during such emergency? In union they must sacrifice some independence of action, and there are bad results from the tyranny of the majority in such cases, but the hardships which have followed impulsive resort to extreme measures have had a good effect to lessen these. Experience, too, will lead to classification among the members

so that the cause of the skilled and worthy shall not be leveled down to that of the lazy and neglectful. Like corporations labor organizations do great good and much evil. The more conservatively and intelligently conducted they are, the more benefit they confer on their members. The more completely they yield to the dominion of those among them who are intemperate of expression and violent and lawless in their methods, the more evil they do to themselves and society. Unfortunately, there are large organizations of the latter class and, in the heat of a bitter contest with employers, rights of person and property are sometimes openly violated in avowed support of the cause of labor. The infractions of the law actual and threatened are palpable, and the interference of the courts by their usual processes to prevent irreparable injury to business and property becomes necessary. Such judicial action often results in discouraging the whole movement and brings down upon the courts the fierce denunciations of the defeated leaders and arouses the hostility of many who would not join in the open breaches of the law, and yet so sympathize with the cause as to blind them to the necessity of the suppression of such lawlessness.

The employees of railroad companies and others engaged in transportation of freight and passengers generally have well organized unions, and the controversies arising over wages and other issues have been many. A vast majority of these have been settled without extreme measures through the conservative influence of level-headed labor leaders and railroad managers, but in the last twenty years there have been some very extended railroad strikes, accompanied by the boycotts and open violence with which society has now become familiar. The fact that many railroads have been operated by Federal receivers, the non-residence of railway corporations in the states where the strikes occur, and the interstate commerce feature of the business, have brought some of these violations of property and private and public right within the cognizance of Federal courts. Because the participants in such contests have been spread more widely over the country than in similar contests with which State courts have had to deal, the action of the

Federal courts in these cases has attracted more public attention and evoked more bitter condemnation by those who naturally sympathize with labor in every controversy with capital.

The efficacy of the processes of a court of equity to prevent much of the threatened injury from the public and private nuisances which it is often the purpose of the leaders of such strikes to cause, has led to the charge, which is perfectly true, that judicial action has been much more efficient to restrain labor excesses than corporate evils and greed. If it were possible by the quick blow of an injunction to strike down the conspiracy against public and private rights involved in the corruption of a legislature or a council, Federal and other courts would not be less prompt to use the remedy than they are to restrain unlawful injuries by labor unions. But I have had occasion to point out that the nature of corporate wrong is almost wholly beyond the reach of courts, especially those of the United States. The corporate miners and sappers of public virtue do not work in the open, but under cover; their purposes are generally accomplished before they are known to exist, and the traces of their evil paths are destroyed and placed beyond the possibility of legal proof. On the other hand, the chief wrongs committed by labor unions are the open defiant trespass upon property rights and violations of public order, which the processes of courts are well adapted both to punish and prevent.

The operation of the interstate commerce law is an illustration of the greater difficulty courts have in suppressing corporate violations of law than those of trade unions. The discrimination between shippers by rebates and otherwise, which it is the main purpose of the law to prevent, is almost as difficult of detection and proof as bribery, for the reason that both participants are anxious to avoid its disclosure; but when the labor unions, as they sometimes do, seek to interfere with interstate commerce and to obstruct its flow, they are prone to carry out their purposes with such a blare of trumpets and such open defiance of law that the proof of their guilt is out of their own mouths. The rhetorical indictment against the

Federal courts, that from that which was intended as a shield against corporate wrong, they have forged a weapon to attack the wage earner, is in this way given a specious force which a candid observer will be blind to ignore. Thus are united in a common enmity against the Federal courts the populist and the trade unionist with all those whose political action is likely to be affected by such a combination. And yet their enmity has no other justification than the differing and unavoidable limitations upon the efficacy of judicial action in respect to corporate and labor evils.

As a matter of fact there is nothing in any Federal decision directed against the organization of labor to maintain wages and to secure terms of employment otherwise favorable. The courts so far as they have expressed themselves on the subject recognize the right of men for a lawful purpose to combine to leave their employment at the same time, and to use the inconvenience this may cause to their employer as a legitimate weapon in the frequently recurring controversy as to the amount of wages. It is only when the combination is for an unlawful purpose and an unlawful injury is thereby sought to be inflicted, that the combination has received the condemnation of the Federal as well as of state courts.

The action of the Federal courts all over the country in the recent American Railway Union strike in issuing injunctions to prevent further unlawful interference by the strikers with the carrying of the mails, and the flow of interstate commerce, followed by the commitment for contempt of the strike leaders who defied the injunction served on them, is what has called out the official protests of the Governors of Illinois and Colorado, and the phrase "Government by Injunction" has been invented to describe the alleged usurpation of power by the Federal tribunals in this crisis.

When the history of the great strike shall be written in years to come, the absurd expectations and purpose of its projectors and their marvellous success in deluding a myriad of followers into their active support will seem even more difficult of explanation than it does to-day. The mind that could conceive and so far execute the plan of taking the entire popu-

lation of this country by the throat to compel them to effect the settlement of a local labor trouble in Chicago, was that of a genius however misdirected. The Governor of Illinois, who coined the phrase "government by injunction," says that the Federal courts have added legislative and executive functions to their ordinary judicial office, in that they have declared in their orders of injunction that to be unlawful which was lawful before, and have sought to enforce obedience to such orders by an army of marshals and soldiers. It is a little difficult to understand the working of a mind having the discipline of a legal training and the experience of judicial service which can honestly and sincerely maintain (and I do not wish to impugn the sincerity of the Governor of Illinois) that the combination described in the bill in the Debs Case and enjoined in the order of injunction was not unlawful. If it was not so, then there is no law in this country securing the right of private property, no law authorizing the Federal Government to operate the mails, no law by which the regulation of interstate commerce is vested in the General Government. A public nuisance more complete in all its features than that which Debs and his colleagues were engaged in furthering cannot be imagined. Such nuisances have been frequently enjoined by courts of equity on the bill of the Attorney-General. Was there any doubt that Debs proposed to continue his unlawful course unless restrained? Was there any doubt that the injury would be irreparable and could not be compensated for by verdict at law? Was it for the court to hesitate to issue its process because it had reason to believe that it would not be obeyed? The novelty involved in the application of such a remedy to such an injury was not that injuries of the same general character had not before been restrained by injunction, but only that never before in the history of the courts had injuries of this kind been so enormous and far reaching in their effect. It was not that men had not before been ordered by process of court to desist from such injuries, but never before had so many men been engaged in inflicting them. Nor can it affect the power of Federal courts to remedy wrongs within their lawful cognizance because the wrong

would have been prevented if the executive of another sovereignty than that under which they are constituted had acted promptly to suppress it. The Federal courts did not assume executive powers any more than they do so when they issue any process to the Marshal and the Marshal as the subordinate of the President executes it. The extent of the actual and threatened injury and the possible resistance to lawful process required the Marshal to call to his assistance much aid, but it is a latter day doctrine that a court is usurping the executive function, in calling upon the executive to use additional force to avoid a possible defeat of its lawful process. The conservative course of the President and the Attorney-General in first applying to the courts for process and the subsequent firmness exhibited by those officers in executing that process by all the means available will cause the country to hold them always in grateful remembrance. The duty of the courts to act on this initiative was so plain that while it does not entitle them to any especial commendation, it would seem that it should protect them from serious attack.

The real objection to the injunction is the certainty that disobedience will be promptly punished before a court without a jury. It is hardly necessary to defend the necessity for such means of enforcing orders of court. If the court must wait upon the slow course of a jury trial before it can compel a compliance with its order, then the sanction of its process would be seriously impaired. Has any injustice been done to Debs in his trial by the court? Is there the slightest doubt in the mind of his fiercest supporter that he violated the injunction? Why, then, complain of his conviction before a tribunal authorized to try him? The argument seems to be that because many men are determined to violate the rights of the public and their fellow-citizens in spite of the lawful orders of the Federal court restraining them from so doing, they should, on account of their number and popular strength, have a right which no Anglo-Saxon has hitherto ever enjoyed, to interpose a jury trial between them and the enforcement of a court's order. If the criticisms under consideration are directed against the existence of courts, then their weight

depends on different considerations from those which apply on the assumption that courts are to be maintained for the purpose of remedying wrongs. But they are professedly based on the Constitution of the United States and that certainly contemplates courts, whose decrees shall be enforced, however, much resisted, and which shall not be merely advisory councils whose efficacy depends on their powers of persuasion.

I am aware that there were many conservative unprejudiced and patriotic citizens in this country, many of them members of the Bar and of this association whose anxiety that the Chicago riots should be suppressed was as great as that of any one, and yet who were of opinion that the action of the Federal courts in issuing the injunctions, which were issued on the application of the Attorney-General were an unwise stretching of an equitable remedy to meet an emergency which should have been met in other ways. To all such persons, I commend the reading of Mr. Justice BRADWELL's opinion in the Debs Case. It is a great judgment of a great court, and makes it as clear as midday that the process therein issued was justified by every precedent, and was the highest duty of the court. The exercise of that duty has, however, only increased the number of those who sincerely believe that the Federal courts are constituted to foster corporate evils and to destroy all effort by labor to maintain itself in its controversies with corporate capital.

I have reached the end of a much too long discussion of the relation of the Federal Judiciary to some of the important issues of the day. It will not be surprising if the storm of abuse heaped upon the Federal courts and the political strength of popular groups whose plans of social reform have met obstruction in those tribunals shall lead to serious efforts through legislation to cut down their jurisdiction and cripple their efficiency. If this comes, then the responsibility for its effects, whether good or bad, must be not only with those who urge the change but also with those who do not strive to resist its coming.

The earlier assaults upon the Federal Judiciary and their harmless character in the light of the event reconciles one to

much of the fiery invective and blood-curdling epithet hurled at men who equally with their accusers are American freemen, impressed with the absolute necessity for maintaining sacred, the guaranties of life, liberty and property, and who are probably not more in love with corruption and greed, or more disposed to crush the humble and worthy, than the average of their fellow-citizens.

The saving grace of American humor which delights in the contemplation of grotesque exaggeration has often saved us from domestic turbulence, which the turgid exuberance of denunciatory language might have otherwise excited, against lawfully-constituted authority; and it may be that same useful trait will prevent the success of the present agitators against the Federal courts.

But whatever fate betide the Federal Judiciary I hope that it may always be said of them, as a whole, by the impartial observer of their conduct, that they have not lacked in the two essentials of judicial moral character, a sincere desire to reach right conclusions and firmness to enforce them.

THE DECISIONS IN PENNSYLVANIA ON THE STATUTES OF 1887 AND 1891 REGULATING THE LIQUOR TRAFFIC.

Discussion of the liquor laws from a legal, political and moral standpoint, has created such public agitation over the subject and made it of so much importance, that a general report of the workings of all systems throughout the country is near at hand. Anticipating such a report, it may be assumed that a thorough knowledge of the existing laws of any state will not be without advantage to one who wishes to become an intelligent reader of the question; nor will interest in such laws be confined to the limits of that state alone. Discovery of the weakness in a law, and proper remedial legislation for the same, can only be obtained by a comparison with other systems, their interpretation, workings and effect.

The extent and value of the business legalized by the

Acts of Assembly approved May 13, 1887 (known as the Retail Act); of May 24, 1887, and June 9, 1891 (known as the Wholesale Acts), and the moral issues involved in the efforts to restrain their operation, have developed certain contentions over their interpretation, which it is the purpose of this article to set forth. There has been no attempt made to give an exhaustive review of the liquor laws, but only to summarize all those cases that have been considered important enough to be taken to the Supreme Court of the state, and on which the Acts themselves are somewhat doubtful. For this purpose the cases form themselves naturally under three heads: 1. Petition; 2. Sale, and 3. Transfer.

PETITION.

Since the passage of the Acts of 1887, the Quarter Sessions courts have had jurisdiction of the license cases in their respective counties, and those courts alone can grant or refuse the privilege of selling liquor: (*Com. v. Switzer*, 129-644.) But a majority of the court is all that is necessary to validate the grant, though the president dissent: (*Branch's License*, 164-427.)

No person has any property in the right to become a liquor dealer, so that no one can compel the grant of a license even in the absence of any allegation that he is an improper person to be so favored. The grant or refusal is discretionary with the court. But this discretion is a legal one to be exercised wisely and not arbitrarily. The judge who grants or refuses all licenses without proper cause is not exercising a judicial discretion, but an arbitrary power. Therefore the court could not refuse to act upon an application, but it could act and refuse to grant the prayer of the petitioner; and a mandamus would not lie to force its assent, though the applicant has complied with all the requirements and is qualified to conduct the business: (*Raudenbusch's Pet.*, 120-328; *Ostertag's Pet.*, 144-426.)

If a hearing is had, and the proceedings are conducted in a proper and legal manner, that is all that can be demanded: (*Petition of Michael Collarn*, 134-551; *King's Application*,

1 Mon. 145.) And the applicant can be denied even a hearing, if he refuses to appear and testify at the request of the court: (*Whetlin's Pet.*, 134-557.) Further, the reasons for refusal form no part of the record, and will not be reviewed on appeal under the Act of May 9, 1889, it being but a substitute for a common law certiorari: (*Pet. of Henry Berg*, 139-354; *Rules of Practice*, 125-xxi.; 131-xxi.)

The objects of the Retail Act of May 13, 1887, P. L. 108, and the Wholesale Act of May 24, 1887, P. L. 194, were essentially different. The former was to restrain the sale of liquors, but the latter was a revenue act. Formerly, therefore, the same reasoning did not apply to the cases of wholesale applications throughout the state as to those for retail petitions; and there was not the same discretion allowed the quarter sessions in the former as in the latter: (*Pollard's Pet.*, 127-507.)

The reasons for this former distinction will be apparent from a review of the decisions.

Section 11 of the Act of May 24, 1887: "Licenses shall be granted in such manner as is provided by existing laws"—refers to the "existing laws" in regard to wholesale and not retail licenses as granted under the Act of May 13th (*Pollard's Pet.*, *supra*.) At that time and up to the passage of the Act of June 9, 1891, it was always a question of what were the "existing laws" as to wholesale licenses in a given locality. The Act of 1856, the foundation of our license system, committed the granting and refusal of licenses to the quarter sessions of the proper county, except Philadelphia and Allegheny. From that time on, Philadelphia and Allegheny had a license system peculiar to them. In the rest of the state, however, the power to grant licenses has been continued in the quarter sessions by the Acts of 1858, 1867 and supplements: (*Ostertag's Pet.* *supra*; *Knarr's Pet.*, 127-554; *Pet. of W. C. McNulty*, 142-475.) In the absence of local laws, these acts governed as the "existing laws," and by them wholesale and retail licenses were placed on the same footing as far as the discretionary power of the court came in question: (*Nordstrom's Pet.*, 127-542.) The result was that

outside of Philadelphia and Allegheny counties the same discretionary power existed in both wholesale and retail cases. These were the existing laws referred to in the Act of May 24, 1887. But in these two excepted counties the wholesale petitioner demanded as a matter of right the grant of his privilege, if he was a citizen of the United States, of temperate habits and good moral character: (*Prospect Brewing Company's Pet.*, 127-323; *Pollard's Pet. supra.*) As can readily be seen, there was considerable unfairness in the operation of this law. The wholesale dealer of Montgomery county, though as fully qualified as his neighbor in Philadelphia, could only pray for his privilege, while the other demanded his. There was still another deficiency that needed a remedy. Under the Act of May 24th, the dealer could sell by the quart. As Mr. Chief Justice Paxson said: "It seems a perversion of terms to call a person who sells by the quart a wholesale dealer. It is practically a retail traffic, and of the worst character." And in the same opinion the court recommends the whole subject to the attention of the legislature: (*Nordstrom's Pet. supra.*)

At the next meeting of that body, the request of the Supreme Court was complied with: and the two defects above referred to remedied to some extent by the passage of the Act of June 9, 1891. This act prohibited the disposal by wholesalers of spirituous or vinous liquors in less quantities than one quart, and brewed or malt liquors in less quantities than twelve pint bottles (Act of June 9, 1891, P. L. 258). It also made a change in the discretionary power of the court. The quarter sessions can now refuse a wholesale license, when it is not necessary for the accommodation of the public, or the applicants are not fit persons. The refusal is not to be an arbitrary one, but based on an opinion "formed after due regard has been given to the number and character of the petitioners for and against such application:" (*Johnson's License*, 156-322). The rules which govern the court in the grant or refusal of wholesale licenses under the Act of 1891 are tersely summed up by Mr. Justice DEAN in *Gross' License* (161-345):

"1. The discretion must be exercised in a lawful manner.

"The applicant has a right to be heard and so have the objectors. A decree without a hearing or opportunity for hearing at a time fixed by rule or standing order as the law directs, would be manifestly illegal and on certiorari would be set aside.

"II. If the court has in lawful manner performed the duty imposed upon it, it is not our business to inquire whether it has made a mistake in its conclusions of fact. Whether the same facts induce in our minds the same belief as in that of the court below, as to the character of the applicant and other material averments is wholly immaterial; it is the discretion of the Court of Quarter Sessions, not ours, that the law requires.

"III. A decree made arbitrarily or in violation of law, it is our plain duty to set aside. For example, if a judge should refuse a license because in his opinion the law authorizing licenses is a bad law, or if he should grant all licenses because he believed the law wrong as tending to confer a privilege on a special few, in either case there would be no exercise of judicial discretion; both would be the mere despotic assertion of arbitrary will by one in power; that sort of lawlessness which is least excusable and excites most indignation.

"IV. If the record shows that the decree was had after hearing at a time fixed by rule or standing order, the presumption is that the decree is judicial and not arbitrary. and this presumption is not rebutted by an argument from the evidence that the court ought to have reached a different conclusion.

"The court need not set out the legal reasons for its action. It is only bound to save them."

Where the court acknowledged in its decree that there were no reasons for refusal, and, if it had been a wholesale license that was sought, they would have felt bound to grant it, a procedendo was awarded on the ground that it was not the exercise of a legal discretion: (*Kelminski's License*, 164-231). Since the Act of 1891 an arbitrary refusal to grant a wholesale license is on the same footing as a refusal to grant a retail license; and now no warrant of law exists for distinction

in this particular between the two kinds of privileges, it being removed by that act. The discretion of the court is the same in both cases: (*Kelminski's License, supra.*)

But a refusal based on the non-necessity for more than two wholesale houses in the same place was upheld, as the discretionary power of the court had been properly used: (*Mead's License, 161-375*). That the place was not located in a city or town, but in a township; that it was not necessary; that the former licensees of the place violated the liquor laws; and that a legitimate business was not conducted there formed good reasons for refusal in one of our latest cases: (*Johnson's License, 165-315*). But the simple assertion that the place was "unnecessary for the accommodation of the public" gives no ground for refusal: (*Germs' License, 36 W. N. 367.*)

Although not expressly decided, it may be safely said that the Act of 1891, being general in its terms, applies to Philadelphia and Allegheny counties, and dealers in those places can now no longer demand their licenses as was done in the Prospect Brewing Company's Petition and Pollards License, but like the petitioners of other counties, they must appeal to the grace of the court.

Notwithstanding these acts, it must be understood that there are counties in this Commonwealth in which no licenses may be granted. A general law does not repeal a local statute by implication. So that neither the Act of May 13, which expressly protects local laws; or May 24th, which is silent on the subject, both being general, would apply to counties governed by special prohibitory statutes. Potter county, which still maintains its prohibition system, is an example of this: (*Murdock's Pet., 149-341.*)

SALES.

The first defence made to an obnoxious law is usually the contention that it is unconstitutional, and the Brook's High License Law formed no exception to this general rule. Its constitutionality was attacked on the ground. (1) It offends against Par. 3, Art. III of the State Constitution, which

declares: "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." (2) It is special legislation, because it makes certain liquor laws applicable to one county and not to another by permitting the special prohibitory laws of some sections to stand.

In answer to the first argument, the Supreme Court said: "There is not a single section or clause of any section, that is not clearly germane to the subject expressed in its title." And to the second: "Nor is it special legislation for the reason stated. The object of the proviso (protecting special prohibitory laws) was not to designate other districts in which no license to sell intoxicating liquors shall be granted; but to avoid any doubt as to the intention of the legislature to leave intact special prohibitory laws enacted prior to the adoption of the present constitution." In other words, not to legislate specially for those different counties, but, to the contrary, not to legislate at all: (*Com. v. Sellers*, 130-32.)

Nor does it take away a vested right by changing the law under which the licensee has previously held, for he takes subject to subsequent legislation, and this applies with the same force to the Act of 1891. So that where a license was still in effect under the Act of 1887, the dealer was bound to conform in his sales to the Act of 1891, which changed his status for the worse: (*Com. v. Donahue*, 149-104; *Com. v. Sellers*, 130-32.)

The question of what are vinous, spirituous, malt or brewed liquors within the meaning of the act is not one of law but of fact, and as such to be decided by a jury and not by the court. If there is no evidence of whether the liquor is either vinous, spirituous, malt or brewed, the court must direct a verdict for the accused. But, if there is a scintilla of evidence on the subject, none but the jury can decide it. So cider, though not usually containing any of these qualities, might under some circumstances that would appear from the evidence be brought within the classes named: (*Com. v. Reyburg*, 122-299.)

It is not only the sale of liquors that is obnoxious, but the

"furnishing" as well, when it is delivered on election day and Sunday, or to a minor or one of "known intemperate habits." (Sect. 17 Act., 1887). This provision applies not only to dealers, but to all persons. Whether the "furnishing" be by gift, sale or otherwise is immaterial. It is a misdemeanor to the same extent. To these excepted classes no one can lawfully give or sell: (*Attenburg v. Com.*, 126-602.)

But the Act of 1887 does not attempt to control the private habits or domestic usage, therefore, the citizen can use on his own table or in his own house what beverages best please him. It is only when the conduct of the individual is such that the public morals or public peace are affected by it, that it becomes a matter of public concern and is subject to the examination and control of the criminal courts. Under this rule no man in Pennsylvania has a right to treat one who is visibly intoxicated: (*Attenburg v. Com.*); but he can treat on Sunday, and that, too, away from his home: (*Com. v. Heckler*, xxxvi. W. N. C. 363. Candidates on election day cannot furnish beer free to voters, nor can persons forbidden to sell on Sunday give away liquor with the same result. But, if for reasons of health or habit, one chooses to supply his own table with his own liquor for use by himself, his family, or his guests on Sunday, no law of the Commonwealth prevents him: (*Com. v. Carey*, 151-368). So that where detectives in order to discover train-wreckers entered suspects by furnishing them liquor at their house on Sunday, no conviction followed. But where a farmer gave free of charge to persons visibly intoxicated, he was convicted; and a druggist met the same fate who sold twice on the same prescription: (*Com. v. Prickett*, 132-371.)

It is a general rule that ignorance of fact excuses where the act if done knowingly, would be *malum in se*. But where a statute commands that an act be done or omitted, which in the absence of such statute, might have been done or omitted without culpability, ignorance of fact or the state of things contemplated by the statute does not excuse. Where the saloon-keeper is ignorant of the age of his customer, he cannot set this up as a defence.

By the Act of 1854 the sale had to be *wilful*, but by succeeding legislation (Acts of 1867, 1875 and 1887) the sale need only be *unlawful*, the word *wilful* being omitted. So it is the act of selling and not the state of mind that stamps the act as a misdemeanor and at which the law is directed. Any other construction would practically nullify the act: (*In re Carlson's License*, 127-330). Though it is well nigh impossible for a bartender or saloon-keeper to know the age of one who may call for a drink, he is liable to have his license taken away from him, if he sell to a person the day before he is twenty-one years of age. And that too, though the minor misrepresents his age. But the dealer is not entirely without protection. By the Act of May 10, 1881, P. L. 12, minors representing themselves of age to obtain liquor are punished by fine and imprisonment; and the same punishment is dealt out to those who represent the minors to be of age.

Ignorantia legis non excusat. Everyone is bound to know the law. By this maxim the agent of a licensee acting innocently can be convicted. He is bound to know the limits of his principal's authority, and if he takes but one step beyond it, he is liable to indictment under the act. He must be careful to sell only where the licensee can do so with impunity: (*Stewart v. Com.*, 117-378; *Zinner v. Com.* 22 W. N. 97; *Com. v. Sweitzer, supra*).

A brewer's license does not entitle him to sell in two different places in the county: (*Zinner v. Com.*). But a brewer who has taken out a license can manufacture and sell his liquor at any one point in the county. He need not sell it where he manufactures, but if he sells away from where he manufactures, he cannot sell where it is made. In other words he cannot have two established places to sell the article. Otherwise he could have as many agencies as there are places in the county: (*Zinner v. Com.*).

It is the contract to sell a chattel and not payment or delivery which passes the property, and this rule is recognized throughout the United States. Whether the title to personal property passes by a sale depends upon the intent of the parties. Such intent may be expressly declared or may be

inferred from circumstances: (*Com. v. Hess*, 148-98). Therefore, where orders are sent for liquor C. O. D. by the purchaser of one county to the seller of another, and delivery is made by the agent of the seller in the county of the purchaser, this is a sale in the county of the seller and lawful. The carrier or agent in such a case is agent for the purchaser and delivery to the carrier in the county of the seller is delivery to the purchaser, and the sale or contract is complete in the place of delivery to carrier. It is only the performance of the contract and not the contract itself that is in question on the collection or non-collection from or delivery or non-delivery to the purchaser: (*Com. v. Fleming*, 130-138). The sale is complete before performance is thought of. But where the agent took orders outside of the county of his principal, and delivered them in the same place, the county of the purchaser, this was held an illegal sale. A dealer can sell to any person in the state, provided the sales are made at his place of business. But he cannot peddle his beer in counties not covered by his license: (*Com. v. Holstine*, 132-357). The purchaser need not call at the business place of the licensee, but such sales may be made in the ordinary course of business. So where orders are received by mail in the county of the wholesale dealer and the liquor is delivered by his wagons or by common carriers in the county of the purchaser, the sale is a proper one: (*Com. v. Hess*, 148-98).¹ Nor would payment by check sent through the mail or to the driver, who delivered as above, constitute a sale in the place of delivery, and no conviction could follow in such a case for sale outside the county: (*Com. v. Kleinmann*, 148-112).²

Selling liquors to persons of "known intemperate habits" comes within the same rule as selling to minors, *i. e.*, ignorance of fact or want of evil intent are not material. "Known intem-

¹ *Com. v. Brauning*, 148-111.

² The rule deduced from these decisions would appear to be, that where the order is received marks the place of sale if the goods are set aside, or charged on the books of the seller, or any other act indicates the meeting of the two minds in a contract; while the place of delivery or payment, being simply the means of performance of a contract already made, is not material.

perate habits" means reputation in the neighborhood for intemperance, and not the actual knowledge of the saloon-keeper. A man who conceals his habits does not come within this class. His habits must be known not only to his family, but to his friends, neighbors, and the community at large in which he lives. He need not be known to every one, but only generally. It is that kind of a reputation he might have for honesty and integrity: (*Com. v. Zell*, 138-615; *Com. v. Silverman*, 138-642).

Before the passage of the Wilson Bill, which allowed the states to make their own liquor regulations, even where it interfered with interstate commerce, there were frequent attempts to evade the law by shipping the liquor from another state and selling it in the original packages, thus bringing it within the ruling of *Lisby v. Hardin* (135 U. S. 100.) But the Supreme Court decided that the stopping of sales on Sunday, and to minors, and the intemperate habits was not on the same footing as the case referred to, and is not an interference with the traffic of the states within the meaning of that decision: (*Com. v. Zell*, 138-615; *Com. v. Silverman*, 138-642.)

The law cannot be nullified by the formation of a so-called social club, which is run as a cover for the sale of liquor without license, but the steward of such club can be dealt with in the same manner as the bartender of an unlicensed saloon: (*Com. v. Tierney*, 148-552). Nor can a *bona fide* social club sell to persons, not members, on Sunday, and they are bound to know who are members of their organization: (*Com. v. Loesch*, 153-502.) What rights belong to the members of a *bona fide* club as among themselves has never been considered by our Supreme Court.

A criminal indictment and the forfeiture of license are not the only punishments meted out to the unfortunate liquor dealer who seeks to evade the license law. Outside of these sanctions which the public demands through its criminal courts, the tavern-keeper is liable in a private action of trespass in our common pleas to a person damaged by an unlawful sale.

With a system of punishment like that which sustains the law of 1887, and the strictness with which it has been construed by our Supreme Court, it is difficult to see why it should not be effectual to meet the purposes of its passage, if enforced by a proper administration.

TRANSFERS.

A licensee's privilege is personal and is not assignable, nor does it go to the personal representatives in case of death. For this reason a license cannot be transferred unless expressly authorized by the Act of Assembly and in the mode therein prescribed. The Act of 1887 is silent on the question of transfers, and they are still governed by the Act of April 20, 1858, Sect. 7, P. L. 366. The act provides that, "if the party licensed shall die, remove or cease to keep such house, his, her or their license, may be transferred by authority granting the same on compliance with the requisitions of the law, etc." The requisitions of the law under this act permit a certain discretion to the authority granting or refusing licenses, and this discretion is now vested in the courts. This discretion, like that in the grants of licenses, depends upon the law and not the individual opinion of any of the judges; but if legally exercised is not reviewable in the Supreme Court: (*Blumenthal's Pet.*, 125-412.)

But a licensee can assign his interest in the license granted to him. Or to express it more correctly, he can consent to the transfer of it to his assignee, who succeeds him in the occupancy of the place. This assignment is subject to the approval of the Court of Quarter Sessions. There is nothing unlawful in this consent, as it is essential to the transfer. For this reason a judgment note given to secure a loan to carry on the liquor business, and an agreement to transfer the license on default in payment, is a legal transaction and not void as against public policy: (*Brewing Co. v. Booth*, 162-100.)

The right to transfer licenses from one person to another is purely statutory, and there is nothing in the law that permits the transfer from one place to another. Therefore, the quar-

ter sessions cannot be compelled by mandamus to make such a transfer. It can be made from person to person, but not from place to place: (*Laird & Co. v. Hare et al. Judges*, 163-481.)

G. VON P. JONES.

DEPARTMENT OF COMMERCIAL LAW.

EDITOR-IN-CHIEF,
FRANK P. PRICHARD, Esq.,

Assisted by

H. GORDON MCCOUCH, CHARLES C. BINNEY,
CHARLES C. TOWNSEND, FRANCIS H. BOWLEN,
OLIVER BOYCE JUDSON.

ROBB T. GREEN, 2 Q. B. 1 AND 315. JULY, 1895.

The defendant being employed by the plaintiff to manage his business, and having access, in the course of his duties to his master's books, secretly copied from the order book a list of the names and addresses of the customers, with the intention of using it in soliciting orders from them, after he had left the plaintiff's employ. Subsequently, his service with the plaintiff having terminated, the defendant did use the list so obtained, while employed by another in a business similar to that of the plaintiff. The plaintiff applied for an injunction restraining the defendant from the use of the list and requiring him to deliver it up to the plaintiff for destruction, and also for damages done to his business by the defendant's solicitation from the list. All of these requests were granted, and it was *held* by HAWKINS, J., that it was an implied term of the contract of service that the defendant would not use, to the detriment of the plaintiff, information to which he had access in the course of the service, and, therefore, that the defendant was liable in damages for any loss caused to the plaintiff by reason of the breach of that term. In the Court of Appeal (affirming the above) it was held that it was an implied term of the contract of service that the servant would observe good faith towards his master during the existence of the confidential relation between them, and that the defendant's conduct was a breach of that contract in respect of which the plaintiff was entitled to damages and injunction.

COMMUNICATION OF MATTERS LEARNED IN A CONFIDENTIAL RELATION.

Both in the lower court and in the court above the decision was placed on the ground that in every contract of service there is an implied stipulation that the servant will observe

good faith towards his employer in respect of the matters confided to him. At the same time the court did not limit the applicability of its statement with regard to implied contracts to the relation of master and servant. Before viewing the particular ground of the present case, the general statement of the court with reference to implied contracts will be considered. In the court below, HAWKINS, J., quotes the language of POLLOCK, C. B., in *Morgan v. Ravey*, 6 H. & N. 265, with approval: "We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." This statement is not clear, but doubtless refers to a contractual relation between two parties, and the enforcement of duties connected with the contract, but not directly contemplated by the parties, or forming the main purpose of the contract. In these cases there may or may not be a public policy favoring the performance of certain duties by either. The most obvious example of the presence of public policy is the case of an inn-keeper or common carrier. In other cases public policy seems to be satisfied by the observance of good faith. Now, so far as the terms of the contract refer to those considerations which are present to the minds of the parties and form an inducing cause, we are no doubt not speaking literally when we say that a jury may infer a promise to do that which the law has imposed on one in his position. This distinguishes contracts or terms of contracts so inferred from contracts inferred from conduct, as where an agreement to pay for goods is inferred from an order or request to furnish them. On the other hand these cases of implied contract are to be distinguished from those where the only remedy takes the form of a remedy in contract. In the latter case there has been no contract or voluntary relation between the parties. Where, however, the parties have voluntarily entered into a relation which contemplates certain objects, the doing of anything by one of the parties inconsistent with that end, or which would make it ineffectual, may well be

considered a part of the contract, so as to prevent recovery and also give right to recover for an injury arising therefrom. The question is not whether the act or conduct which actually prevented the party from receiving the benefit to which he was entitled, was contemplated by the parties, but whether it was so related to the performance as to make any benefit received of no value. This is the view of Rowen, L. J., in *Lamb v. Evans*, [1893] 1 Ch. 218, 229. He there says: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as a part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer, in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile."

Implied contracts within the above meaning are most likely to appear where the object of the contract is not a single act, but a course of action, as in the relation of master and servant. The question as to what conduct is inconsistent with the servant's duty, takes the form of a justification for a discharge. Thus in *Macdonald on Master and Servant*, it is said (p. 210): "A servant is bound to consult the interest of his master and may be discharged for acts seriously injurious thereto. Disclosure of a master's trade or business secrets, disclosure of the accounts of a company to a person connected with another company, advising and assisting an apprentice to quit his master's service, . . .—in all these instances masters have been warranted in dismissing servants." In all these cases the only ground of dismissal has been a breach of the servant's contract for faithful service, and though the point has not arisen, there can be no doubt that if any injury was occasioned to the employer, he would have a right of action against such a servant.

Likewise any agreement, act or conduct by an employee in the course of his work, for his own profit and to his master's prejudice, will be treated as contrary to public policy and of

no effect: *Lum v. Clark*, 57 N. W. Rep. 662 (Minn.); *Woodstock Iron Co v. Extension Co.*, 129 U. S. 642; *Davenport v. Hulme*, 32 N. Y. Sup. 803; *McEwen v. Schannor*, 64 Vt. 583.

Where an employee is intrusted with a trade secret, the use of this secret for his own profit and to the disadvantage of his employer will be restrained: *Peabody v. Norfolk*, 98 Mass. 408; *Morison v. Moat*, 9 Hare, 281; *Fralick v. Davenport*, 30 Atl. Rep. 521 (Pa.). In *Tabor v. Hoffman*, 118 N. Y. 30 (1889), the defendant had invented a pump, the patent on which had expired. He was manufacturing pumps with an improvement incorporated in his pattern, which was not made public. The defendant hired a man who was employed to repair the patterns to make copies of them. The defendant was enjoined from the use of the patterns so obtained. Most of these cases place the decision on the ground of a breach of confidence without determining its effect on the contract of employment. But there can be no doubt that disclosures of such a secret would justify dismissal, enable the employer to resist an action for wages due, and entitle him to damages.

Where a person makes use of the information he has learned in a confidential relation the grounds of the decision against such use are variously stated as a breach of trust, violation of an implied contract, or the interference with a property right. And sometimes it is indicated that a distinction is to be drawn between them. In the present case [1895] 2 Q. B. 319, KAY, L. J., says that there has been a breach of trust, if not a breach of contract, and that an injunction should be granted and the list of names should be given up to be destroyed. He continues: As to the damages, I think there is more difficulty. The right to them depends on whether the conduct of the defendant can be regarded as a breach of an implied contract." The distinction intended by the Lord Justice is not clear. Without the confidential relation, which was violated by the making and use of the list, there would be no ground for an injunction. In *Curtiss v. Walker & Co.*, 64 Fed. Rep. 280, it was sought to restrain a photographer from making copies of a photograph, which he

had purchased from another photographer who had taken them for the plaintiff without the privilege of reproducing them for his own profit. The court said: "When a person engages a photographer to take his picture, agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer: *Pollard v. Photographic Co.*, 40 Ch. Div. 545; *Tuck v. Priest*, 19 Q. B. D. 629. Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of right which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk: *Duke of Queensberry v. Shirlane*, 2 Edm. 329; *Ger v. Pritchard*, 2 Swanst. 402; *Folsom v. Marsh*, 2 Story, 100; *Abernethy v. Hutchinson*, 3 Law J. Ch. 209; *Cand v. Sime*, 12 App. Cas. 326; *Tipping v. Clarke*, 2 Hare, 383; *Williams v. Insurance Co.*, 23 Beav. 338." It seems to the writer unimportant whether the communication of matter learned in the confidential relation is regarded as a breach of trust or a breach of contract or a violation of a property right, so far as the right to compensation is concerned. There can be no doubt of the applicability of the principle to the present case. The secret copying of the list with the intention of using them in competition was undoubtedly a dishonorable means of enabling the servant to maintain a competition with his master after the employment. The fact that a servant after the termination of his employment may compete with his former employer for the trade of his customers of the employer, (*Irish v. Irish*, 40 Ch. D. 49; *Helmors v. Smith*, 35 Ch. D. 449.) will not justify every means to facilitate that competition taken by a servant in violation of his present duty to that employer.

H. A. C.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E.H. Esq., 725 Chestnut Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SKYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-IV. San Francisco: Bancroft-Whitney Co. 1895.

HAND-BOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY. St. Paul: West Publishing Co. 1895. (No. 8, Hornbook Series.)

OUTLINES OF TRIAL PROCEDURE. By J. L. BENNETT. Donohue & Henneberry (Printers), Chicago. 1895.

HAND-BOOK OF INTERNATIONAL LAW. By Captain EDWIN F. GLENN, Acting Judge Advocate U. S. Army. St. Paul: West Publishing Co. 1895.

THE LAW RELATING TO THE PRODUCTION AND INSPECTION OF BOOKS, PAPERS AND DOCUMENTS IN PENDING CASES. An Address by THOMAS J. SUTHERLAND. Chicago: The Gladstone Publishing Co. 1895.

THE RELIGION OF THE REPUBLIC AND LAWS OF RELIGIOUS CORPORATIONS. By Dr. A. J. KYNETT. Cincinnati: Western Methodist Book Concern. 1895.

SELECTED CASES, ETC.

AMERICAN RAILROAD AND CORPORATION REPORTS, Annotated. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

AMERICAN ELECTRICAL CASES. With Annotations. Volume III. 1889-1892. Edited by WILLIAM W. MORRILL. Albany: Matthew Bender. 1895.

PAMPHLETS.

THE QUINZER SERIES. Nos. 8 and 9. Questions and Answers on Common Law Pleading (No. 8). By GRIFFITH OGDEN ELLIS and EMIL W. SNYDER. Questions and Answers on Corporations (No. 9). By WM. C. SPRAGUE. Detroit: The Collector Publishing Co. 1895.

UNIFORM STATE LEGISLATION. By FREDERICK J. STIMSON. A Paper Submitted to the American Academy of Political and Social Science. Publication No. 145, of the American Academy of Social Science, Philadelphia. 1895.

BOOK REVIEW.

YOUR WILL ; HOW TO MAKE IT. By GEORGE V. TUCKER.
Boston : Little, Brown & Co. 1895.

This little volume, while addressed to the laymen, rather than to the profession, differs from many such so-called "popular" law books in that it does not profess to make every man his own lawyer, and consequently independent of legal advice. In fact, such an idea is distinctly repudiated, the object, as stated by the author, being merely to give the would-be testator a sufficient general grasp of the subject to enable him to give to his counsel intelligent directions as to his wishes, and to show him what he can and cannot do, and what the result of certain acts or omissions may be, not to give him that special knowledge whereby he may without assistance make a good and valid will.

The author conscientiously adheres to this idea throughout, and nowhere suffers himself to be drawn into the discussion or elucidation of disputed points of law. Everything is simply expressed and easy to understand, and while technical expressions are constantly used, the meaning is always explained. The book is made up of broad and simple rules of law clearly set forth.

On the whole, the work is one of distinct value for the purpose for which it was written. When we consider the general ignorance of the public as to this all important branch of the law, and the vast number of cases where the intentions of testator are defeated by their ignorance of the simplest legal principles, we must welcome any work which will tend to fit the public at large to understand exactly what they wish to do with their property, and give them some idea as to how they may do it. The practitioner is only too glad to have his client intelligently prepared for the interview.

The style is clear and simple, and the arrangement good. The book is convenient in size and attractive in appearance.

FRANCIS H. BOWLEN.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

OCTOBER, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR SEPTEMBER.

Edited by ARDENUS STEWART.

When the legislature has empowered the governor or other officers of the state, on its behalf, to appoint an agent to prosecute a claim, and to fix his compensation, *to be paid out of any amount received therefrom*, the officers named can make a contract authorizing a person to prosecute the said claim, and providing that his compensation shall be a certain per cent. of the amount collected by him, to be paid out of the proceeds thereof; and such a contract will not be void, as against public policy, because it makes the payment of compensation contingent on success: for the legislature, by the wording of the statute, expressly authorized the making of such a contract: *Davis v. Commonwealth*, (Supreme Judicial Court of Massachusetts,) 41 N. E. Rep. 292.

Attorney
and Client,
Contingent
Fee,
Claim by
State

The Supreme Court of Pennsylvania has recently rendered a very peculiar decision in regard to the use of bicycles, hold-

Bicyclers,
Riding on
Sidewalks,
Liability to
Prosecution

ing, in *Commonwealth v. Forrest*, 32 Atl. Rep. 652. (1) That under the act of Pennsylvania of 1889, May 7; P. L. 110, § 3, which makes it a penal offence for any person to wilfully "ride or drive any horse or other animal," on a sidewalk, and that of 1889, April 23; P. L. 44, § 1, which provides that bicyclers shall be subject to the same restrictions as are prescribed by law in the case of persons using carriages drawn by horses, one who

rides a bicycle on a sidewalk is subject to the punishment prescribed for a violation of the former act; (2) That in a prosecution for riding a bicycle on a sidewalk it is no defence that the informer contributed nothing to the original construction of the sidewalk, or did not aid in keeping it in repair; nor that the sidewalk was on land appropriated by a turnpike company, when the latter consented to such use of its land; nor that the company consented to defendant's riding on the sidewalk, when the sidewalk was constructed and used as such along the public highway; nor that defendant and others using similar vehicles regularly rode on the sidewalk without complaint.

It is difficult to discover in the opinion of the court any sufficient grounds for such a decision. It rests entirely upon the supposed parity of the subject-matter of the two acts; but this is a pure assumption. In the first place, the act of April 23 makes bicyclers subject only to the *restrictions* imposed on horsemen,—not to their *liabilities*. These two things are by no means the same; granting that a penal liability implies a restriction, a mere prohibition does not imply a penal liability; and it is the restriction, not the liability, to which the bicyclist is made subject. This is very cleverly dodged by the court, as follows: "The first-named act [May 7] imposed a penalty upon the driver of a horse who should wilfully drive him upon any sidewalk in any township within the commonwealth. The last-named act [April 23] subjected the bicyclist rider to the same restriction as the driver of the horse. The driver of the carriage and the bicycle have the same rights and are subject to the same restrictions and penalties." Observe how neatly the court reads into the act the words which the legislature did not put there, and which, in view of their importance, and the nature of the subject, they must be held to have omitted intentionally! There could not be a clearer case of judicial legislation.

In the second place, the act of April 23 subjects the bicyclist only to such restrictions as are imposed by law,—that is, to existing restrictions, not future ones. Again, if the legislature had intended to subject the riders of bicycles to future as well

as existing restrictions, it would have been very easy to have done so by making the act read "are *or shall be* prescribed by law." This would have avoided all question. But they did not do so; and not having done so, the court cannot, except in a clear case, do it for them.

Now, in regard to these two objections, it must be borne in mind that whatever their intrinsic weight may be, it is multiplied by the cardinal axiom of statutory construction, that a penal statute is to be construed strictly. The spirit of such a statute is not to be loosely held, at the pleasure of the court, to include cases not expressed. It was entirely within the power of the legislature to make the act of April 23 include future as well as existing restrictions, and to make the bicycler subject to liabilities as well as restrictions; but it did not do so: and no court has power to do for the legislature what it fails to do for itself. Such a decision as that in this case is a gross abuse of the judicial powers.

But there is another aspect of the case which is very delicately dealt with by the court. It seems to have felt that after all it was perilous to attempt to read the act of May 7 into the act of April 23; and it therefore expatiates at length on the fact that the bicycler is within the spirit of the act of May 7. This is the demonstration of the latter proposition. "It will scarcely be disputed that a bicycler is within the spirit of the act. It is wholly improbable the legislature intended to exempt him. The sidewalk is for foot travelers, men, women and children. A very few years of observation and experience in the new mode of traveling by bicycle has resulted in the conclusion that this vehicle is fully as dangerous to those walking on the same road as the carriage drawn by a horse. A carriage, with rider, weighing together two to three hundred pounds, propelled with the speed of a trolley car on a sidewalk, is full of peril to the life and limb of the foot traveler. No bicycler, with due regard to the safety and rights of his fellows, should demand the use, in common with foot travelers, of a walk, with such a vehicle; *and the intention of the legislature to debar him from such use is manifest, not only from the terms of the two acts, when*

read together, but also from the reason and spirit that prompted their passage."

The moral reflections that precede this last paragraph are most excellent; but they neither lead to the conclusion italicized, nor do they offer any warrant for supplying an intention that the legislature *did not manifest*. The fact is, as a careful examination of the act of May 7 will show, that the foot traveler is not only not mentioned, but was the very last thing in the mind of the legislature. The land-owner is empowered by the first two sections to build a sidewalk along his land at his own expense, using therefor the public highway, instead of his own land; and the drivers of horses or carriages are liable to penalty for driving thereon, because of the injury they may do the sidewalk, and the consequent expense of repair to the land-owner, not because of the danger to foot travelers. The language of the act shows this clearly. "If any person or persons shall wilfully and maliciously ride or drive any horse or any other animal, upon or into any boardwalk or sidewalk or footway laid, erected or being on and along the side of any road or highway in any township of this Commonwealth, or shall *otherwise* wilfully break, injure, or destroy the same," etc. The word "otherwise" is ~~the~~ key to the construction of the act. It shows that the intention of the legislature was to protect the sidewalk, not ~~the~~ foot traveler thereon, and since it cannot be seriously argued that a bicycle can do damage to a sidewalk, bicyclers are ~~therefore~~ not within the spirit of the act. It is to be hoped ~~that~~ the next case of the kind will find the court in a better ~~frame~~ of mind. Meanwhile, Mr. Forrest has had to suffer.

Judge RITCHIE, of the Superior Court of Baltimore, has just decided a most interesting case of first impression, the report of which we would like to print in ~~full~~, if space permitted. In it he holds that the pursuer of a section in a Pullman sleeping ~~car~~ for a given trip has the right on leaving the ~~train~~ before he reaches his destination, to transfer the use of his section to another first-class passenger, for the rest of the trip for which it was sold.

Carriers.
Passengers,
Pullman
Sleeper.
Transfer of
Ticket

On grounds of public policy alone, an express contract entered into between the mayor and council of a city and one who is at the time a councilman of that city, for the performance of services for the city, will not be enforced, even though there be no penal statute prohibiting the execution of such a contract. While it remains executory, such a contract, though not absolutely void, may be avoided by the city at will; but when it was entered into in good faith, was for the doing of lawful and necessary work for the city, and has, without objection, been fully executed, the city receiving and retaining the benefit thereof, a recovery may be had on a *quantum meruit* for what the services were reasonably worth: *City of Concordia v. Hagaman*, (Court of Appeals of Kansas), 41 Pac. Rep. 132.

So, in *Capron v. Hitchcock*, 98 Cal. 427; S. C., 33 Pac. Rep. 431, under a statutory provision that no officer of a city "shall be interested in any contract to which the city is a party, and any contract contrary to the provisions hereof shall be void," a contract by a city with one of its school directors for street work was held void.

It is not necessary, however, that the interest of the officer should be direct, in order to vitiate the contract. It will in general be sufficient to avoid it, if the officer have only an indirect interest therein, such as arises from being a member of a firm or corporation with which the contract is made, or the like: *State v. Consumers' Water Co.*, (N. J.) 28 Atl. Rep. 578. Such a contract, however, may be ratified by a subsequent resolution of councils, passed after the officer has ceased to be such; for the ratification is equivalent to a new contract: *Fort Wayne v. Lake Shore & Mich. South. Ry. Co.*, 132 Ind. 558; S. C., 32 N. E. Rep. 215.

The pet measures of the labor unions seem lately to have met with scant favor at the hands of the courts; and it seems to speak ill for the intelligence and honesty of the former bodies that such should be the case. Judge WHITE, of the Superior Court of Buffalo, in *Pro. v. Warren*, 34 N. Y. Suppl. 942, has recently declared

City Officers,
Contract with
City

Constitutional
Law,
Employment
of Aliens

void the statute of New York of 1870, c. 385, § 2, as amended by the act of 1894, c. 622, which makes it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer on such works. This he holds to be in violation of the constitution of New York, Art. 1, § 1, which provides that no citizen shall be deprived of any of his rights or privileges unless by the law of the land or the judgment of his peers, of Art. 1, § 6, which enacts that no person shall be deprived of liberty or property without due process of law, and of the Fourteenth Amendment to the Constitution of the United States, which forbids any state to make a law which shall abridge the privilege or immunities of citizens of the United States, or to deprive any person of liberty or property without due process of law; and also violates the third article of the treaty between the United States and Italy, which secures to resident Italians in the United States the same rights and privileges as are secured to our own citizens.

Further, the Supreme Court of Georgia has recently declared unconstitutional the act of that state of 1891, Oct. 1; P. L. 188, which required railroad, express and telegraph companies to give to their discharged employes or agents the causes of their removal or discharge, when discharged or removed, under penalty for non-compliance. The grounds upon which the decision rests are these: (1) Liberty of speech and of writing is secured by the constitution, and the correlative liberty of silence, not less important nor less sacred, is incident thereto; (2) Statements or communications, oral or written, wanted for private information, cannot be coerced by mere legislative mandate at the will of one of the parties and against the will of the other; (3) Compulsory private discovery, even from corporations, enforced not by suit or action, but by the terror of a statute, is not allowable when rights are already under the guardianship of due process of law; (4) That granting that the state may compel a discovery of matters in which it has an interest, the public, whether as many or one, whether as a multitude or as a sovereignty, has no interest to be protected or

Compelling
Disclosure of
Reasons for
Discharge of
Employee

promoted by a correspondence between discharged agents or employes and their late employers, designed not for public but for private information, as to the reasons for discharges, and as to the import and authorship of all complaints or communications which produced or suggested them ; (5) That a statute which attempts to make it the duty of a corporation to engage in correspondence of this sort with its discharged agents and employes, and which subjects them in each case to a heavy forfeiture, under the name of damages, for failing or refusing to do so, is violative of the general private right of silence enjoyed by all persons, natural or artificial, from time immemorial, and is therefore utterly void: *Wallace v. Ga., C. & N. Ry. Co.*, 22 S. E. Rep. 579.

In *Crall v. Toledo & Ohio Central Ry. Co.*, 7 Ohio Cir. Ct. 132, it was decided that under the statutes of Ohio, requiring railway companies to furnish in writing, on demand of a discharged employe, the reasons for his discharge, but not declaring a refusal to do so unlawful, an employe could not maintain an action for the penalty prescribed for an *offence* against the act. The question of constitutionality was not raised, and, in view of the above decision, that could not easily have been done.

The Supreme Court of Pennsylvania, which is nothing if not original, has just held that the legislature has the power to pass a law limiting the number of candidates for office for which a voter can cast his ballot, when there are several to be elected to the same office at the same time. In order to support its decision, it has had recourse to a new principle of constitutional construction, which had escaped the sages of the law hitherto—that of the policy of the constitution. Observe the logic of this paragraph!—"A limited voting plan was recognized and adopted in the constitution because it was deemed wise that, as to offices non-partisan in character, or which at least should be, the minority party ought to have representation, and this could only be attained by limiting voting. Does the expression of this thing necessarily exclude other things not expressed?

Limited.
Vote at
Elections

As the same reasons for the plan exist as to like offices thereafter created, is not a necessary deduction that a like plan to that expressed should be followed? Does not the whole spirit of the constitution plainly so imply, while there is not a word indicating that such plan as to other or new courts is forbidden? In the case specified the constitution is mandatory. It says to the legislature in thus enumerating them, 'Thou shalt prescribe the limited voting plan.' In the cases not enumerated it is discretionary."

Comment on such language is needless.

The Supreme Court of Pennsylvania has recently ruled, that since the constitution of that state, Art. I, § 18, declares that no person shall be attainted of felony, and § 19 provides that no attainer shall work corruption of blood, nor forfeiture of estate, except during the life of the offender, and since the statute of descent and distribution enacts that on the death of a person his estate shall vest in his children, in the absence of a will, a son who murders his father in order to get immediate possession of his share of the father's estate becomes vested with that share, in the absence of a will: *In re Carpenter's Estate*, 32 Atl. Rep. 637. WILLIAMS, J., dissented from this ruling, saying tersely, "The son could not, by his own felony, acquire the property of his father, and be protected by the law in the possession of the fruits of his crime."

The decision of the majority seems to be in accord with the consensus of opinion. The only exception is in New York, where, in *Riggs v. Palmer*, 115 N. Y. 506; S. C., 22 N. E. Rep. 188, it was held that when a beneficiary under a will, in order that he might prevent revocation of the provision in his favor, and obtain the speedy enjoyment and possession of the property, wilfully murdered the testator, he was, by reason of his crime, deprived of any interest in the estate left by his victim, and therefore was not entitled to the property either as donee under the will or as heir or next of kin, supporting this conclusion by the never before heard of proposition, that *all laws*, as well as contracts, may be controlled in their

Criminal Law,
Attainder,
Perpetration,
Inheritance

operation and effect by these general fundamental maxims of the common law, viz.: No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime. But the court prudently omitted to cite any authority for such a doctrine, except some broad rules of statutory construction which had no proper application to the case in hand. The decision is thus caustically criticised in *Deem v. Millikin*, 6 Ohio Cir. Ct. 357: "It must be admitted that the most careful examination of *Riggs v. Palmer* fails to discover any clearly stated and clearly applicable principle justifying the decision. The spirit of fearless inquiry was exorcised early in the opinion, when every one contemplating a conclusion different from that reached by the majority was warned that if he should persevere, it would be disparagingly said of him '*qui hæret in litera hæret in cortice*.'"

Accordingly, it has been held in England that a wife who has murdered her husband is entitled to her share of his estate; *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q.B. 147; in North Carolina, that a widow convicted as accessory before the fact to her husband's murder is entitled to dower in his lands: *Owens v. Owens*, 100 N. C. 240; S. C., 6 S. E. Rep. 794; in Ohio, that a child who murders his parent can inherit his estate: *Deem v. Millikin*, 6 Ohio Cir. Ct. 357, and in Nebraska, that a father who murders his daughter inherits from her: *Shellenberger v. Ransom*, 41 Neb. 631; S. C., 59 N. W. Rep. 935, reversing 31 Neb. 61; S. C., 47 N. W. Rep. 700. In the last case cited, the court was misled by a failure to closely criticise the case of *Riggs v. Palmer*, on which it rested its decision, and it very freely acknowledges that fact, and points out the fundamental error of *Riggs v. Palmer*, in the opinion on rehearing, in 41 Neb. 631; S. C., 59 N. W. Rep. 935.

It is true that the beneficiary in a life insurance policy cannot recover, if he has feloniously caused the death of the assured, nor can his assignee do so: *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591; S. C., 6 Sup. Ct. Rep. 877; but this is because the right in such a case is founded

upon contract, not upon law. This very point was admitted by the Court of Appeal in *Cleaver v. Mutual Reserve Fund Life Assn.*, [1892] 1 Q. B. 147, while at the same time it held that as the wife could not take by reason of her crime, the insurance money became part of the estate of the insured, and went to her as his legal representative.

An instrument given by a father to his children, in form an absolute deed, and executed as such, but not attested as a will is required to be, which contains the following clause, "provided always, and it is expressly understood and agreed, that this conveyance is not to take effect till after my death, and that, at my death, the title to the foregoing lands is to vest immediately in my said children," will be construed as a deed reserving a life estate to the grantor, if it was delivered when executed, and the grantor lived on the land with the grantees until his death, without attempting to make any other disposition of the land: *Abney v. Moore*, (Supreme Court of Alabama.) 18 So. Rep. 60.

There is a full annotation on this subject in 1 AM. L. REV. & REV. (N. S.) 140.

The uncertainty as to the validity of irregularly marked ballots under the Australian Ballot system still continues.

The Supreme Court of California is the latest to pass upon this question. In *Tebbe v. Smith*, 41 Pac. Rep. 454, that court, while holding that the provisions as to the marking of ballots are in general mandatory, yet concludes that under the laws of that state, which provide: (1) That there shall be a margin on the ballot one-half inch wide, at the right hand of the names, so that the voter may clearly indicate, in a manner afterwards provided, the candidate for whom he votes, and that the clerk shall have printed in it, "To vote for a person, stamp a cross (x) in the square at the right of the name;" (Pol. Code Cal. § 1197;) (2) That the voter shall prepare his ballot by making a cross after the name of the person for whom he intends to vote;

Deed,
Title to Vest
after Death of
Grantor,
Effect

Elections,
Ballots,
Marking

(Pol. Code Cal. § 1205;) (3) That any ballot not made as provided in the act shall be void, and shall not be counted; (Pol. Code Cal. § 1211;) and (4) That no voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him; (Pol. Code Cal. § 1215;)—that though the statute impliedly requires the printing of a square for the cross-mark at the right of the name of each candidate, yet as it does not expressly so provide, that requirement cannot be considered as making it mandatory on the voter to mark in the square; and therefore ballots with crosses placed opposite the candidate's name, but without the square, should be counted as votes for the candidate opposite whose name the mark is placed; but a ballot with the letter "J" written in pencil in the blank space left for the insertion of the name for an office is void, and should not be counted.

In the same election, there appeared on all the ballots cast, written on the blank space under the office of justice of the peace, "G. G. Brown, ——— Republican." The evidence showed that the writing was all done by the same person, but did not show who did the writing, nor whether it was on the tickets when they were put in the voters' hands, and that there was but one person in the precinct lawfully assisted in marking his ballot; and it was accordingly held that these ballots, except the one of the voter lawfully assisted, were not made as provided by the ballot act, and should therefore be rejected, under § 1211 of the Political Code.

It was also decided in this case, that under Pol. Code Cal. §§ 1160, 1162, which provide that the polls shall be opened at sunrise, and be kept open till 5 P. M., and that a ballot box must not be removed from the polls, in the presence of bystanders, the votes cast at a precinct where the polls were not opened until 10 A. M., and the ballot box was taken by the election officers with them to dinner, are void, and should not be counted.

However, in *Moyer v. Van de Vanter*, 41 Pac. Rep. 60, the Supreme Court of Washington has decided that the statute of that state, (Gen. Stat. Wash. § 391,) which provides that

Names
Written in
same Hand-
writing

Time of
Opening Polls,
Removal of
Ballot Box

any ballot not indorsed by the official stamp and the initials of an inspector or a judge of election shall not be counted, is in conflict with the provisions of the constitution, (Const. Wash. Art. 6, §§ 1 & 6.) which declare that all persons possessing the requisite qualifications shall be entitled to vote at all elections, and that all elections shall be by ballot.

The cases on the subject of ballot marking will be found in 1 AM. L. REG. & REV. (N. S.) 748; 2 AM. L. REG. & REV. (N. S.) 85, 155, 222, 491, 556.

The Supreme Court of New Jersey, in *Brady v. O'Brien*, 32 Atl. Rep. 698, has recently been obliged to reaffirm the rule of citizenship by Birth which prevailed at common law, and was enacted by the Fourteenth Amendment to the Constitution of the United States, that all persons born in the United States of parents domiciled here are citizens of the United States and of the state wherein they reside, with the exception of children born of persons resident here in the diplomatic service of foreign governments.

In *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 583, a child, born in New York of alien parents, during their temporary sojourn in that city, who returned with them the same year to their native country, and thereafter always resided there, was held to be a citizen of the United States, following the rule of the common law, that all persons, born within the king's allegiance, become subjects, whatever the situation of their parents.

In *In re Look Tin Sing*, 10 Sawy. 353; S. C., 21 Fed. Rep. 905, Justice FIELD held that a person born within the United States, of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the Emperor of China, is a citizen of the United States. The same was decided in *Ex parte Chin King*, 35 Fed. Rep. 354; *In re Yung Sing Hec*, 36 Fed. Rep. 437; *In re Wy Shing*, 36 Fed. Rep. 553; *Gee Fook Sing v. United States*, 49 Fed. Rep. 146. But this rule does not apply to the citizens of independent political communities existing within the borders of a larger state, even though the latter exercises a protectorate over them; and therefore a child born of Indian, or of Indian and alien parents,

is not a citizen of the United States, though born within its territory: *Elk v. Wilkins*, 112 U. S. 94; S. C., 5 Sup. Ct. Rep. 41; *McKay v. Williams*, 2 Sawy. 118.

In *Denver Consolidated Electric Co. v. Simpson*, 41 Pac. Rep. 499, the Supreme Court of Colorado has very clearly defined the responsibility of a company which maintains electric wires in a public highway. Like other persons using instrumentalities which may become dangerous to others if misused, they are only bound to exercise that reasonable care which a reasonably prudent person would exercise under similar circumstances; but, as the business is attended with great peril to the public, the care to be exercised is commensurate with the increased danger. Accordingly, evidence that the wire of an electric light company, so highly charged with electricity as to be dangerous to persons coming in contact with it, is detached from its fastenings and hangs down in an alley, so as to endanger public travel, it is *prima facie* evidence of negligence on the part of the company; and if degrees of negligence are not recognized, an instruction that the company is bound to use the highest degree of care in the maintenance and construction of its wires is not a prejudicial error.

It was also decided in the same case, that the fact that a complaint for injury caused by coming in contact with a wire belonging to an electric light company contains allegations assuming that the defendant company is an absolute insurer of the public against injury by its wires will not render it bad on that ground, when it also alleges that the location and defective condition of the wire in question was due to negligence of the defendant in the building of its line and keeping it in repair.

The Supreme Court of Vermont has lately held, that when the water of a stream running through a farm is taken by a village for its waterworks, the owner is entitled not only to damages for being deprived of the water for farm purposes, but also to damages for being deprived of the opportunity to sell water rights to prospective purchasers of village

Electric
Wires,
Negligence

Pleading,
Surplusage

Eminent
Domain,
Appropriation
of Water,
Damages to
Riparian
Owner

lots plotted out for sale in a part of the farm: *Bridgman v. Village of Hardwick*, 32 Atl. Rep. 502.

In *Stratton v. Universal Stock Exchange, Ltd.*, [1891] 2 Q. B. 329, an action brought to recover back securities deposited

Gambling
Contract,
Wager,
Recovery,
Stock
Gambling

as margin for differences which might arise on gambling transactions in stocks and shares, the Court of Appeal of England has recently held, that the Gaming Act of that country of 1845, which enacts that "no suit shall be brought or maintained in any

court of law or equity for recovering any sum of money or other valuable thing . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," applies only to money or valuable things deposited as the stake to abide the event of a wager, and does not apply to money or valuable things deposited as security for the observance by the loser of the terms of the wagering contract; and that the authority to retain the securities may be revoked and the securities recovered back at any time before the holders have appropriated them to their own use.

In a recent case, *State v. Dyer*, 32 Atl. Rep. 814, the Supreme Court of Vermont has laid down several valuable

Labor
Union,
Conspiracy

rules with regard to the prosecution of members of a labor union for conspiracy to drive a mechanic out of his employment. The reason of their action was that the mechanic would not join a union. The information for conspiracy charged that its purpose was to prevent the mechanic "from obtaining work or employment or continuing in said work and employment" with a certain corporation, "or in any other shops or works;" and this was held not to be bad, as charging offences in the alternative, since the information also alleged that the mechanic was an employe of the corporation when the conspiracy originated.

There was evidence that all the persons charged were members of the union; that the mechanic was compelled by them, as members of the union, to quit his employment; that one of the accused was secretary, and recorded the minutes of an

executive meeting at which a report of the mechanic's case was made, and at that meeting was appointed as one of a committee to investigate the trouble, and subsequently acted as such; and it was accordingly held that the secretary was a conspirator.

On the trial of this case, conversations between certain of the conspirators and one with whom the mechanic, after being driven from his employment, had engaged to work, taking place a week after the mechanic had been driven from his first employment, which connected the alleged conspirators with the conspiracy, and in which the employer stated that he canceled his agreement to employ the mechanic when he heard that he had been compelled by the union to leave his first employment, and gave the reasons the mechanic gave for not joining the union, were held admissible in evidence, as a part of the principal act.

It is a corollary of the doctrine that the concurrent negligence of a driver is not to be imputed to a passenger who has no control or authority over him, that the passenger is also not to be held chargeable with personal negligence for a failure to stop, look and listen when approaching a railway crossing; for he cannot compel the driver to stop, and is under no obligation to jump out of the vehicle. Accordingly, it has been lately decided by the Supreme Court of Minnesota, that when the plaintiff was riding at the invitation of the owner, in a wagon owned and driven by another, having no control over the driver or his management of the team, not standing to the driver in the relation of master to servant, or principal to agent, and not being engaged in a common enterprise with him, and there being no evidence that the plaintiff knew that the driver was incompetent or was not keeping a proper lookout for trains at the crossing, the former could not be charged with either imputed or personal negligence as matter of law, but that the question was one of fact for the jury, although it appeared that if the plaintiff had exercised the degree of vigilance in "looking and listening" required of one in control and management

Negligence,
Stop, Look
and Listen,
Passenger
in Vehicle

of a team, he would have discovered the approaching train in time to have avoided injury: *Howe v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 64 N. W. Rep. 102.

A similar conclusion was reached in *O'Toole v. Pittsburgh & Lake Erie R. R. Co.*, 158 Pa. 99; S. C., 27 Atl. Rep. 737, where the court held that a passenger in a street car approaching a grade crossing of a railroad is under no obligation to look out and listen for approaching locomotives, or to jump off the car in apprehension of a possible collision. These cases are in apparent conflict with those which hold that the passenger is chargeable with negligence if he remains in the vehicle with knowledge of impending danger: *Brickell v. N. Y. Cent. & Hudson R. R. Co.*, 120 N. Y. 290; S. C., 24 N. E. Rep. 449; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. 514; S. C., 18 Atl. Rep. 718. But the fact is that in both the cases cited the decision is made to cover more ground than the circumstances would warrant. In the New York case, the plaintiff and the driver were on the same seat of a top buggy, the top of which was raised, which prevented them from seeing anything except in front, and there was a snowstorm in progress at the time. These facts made the danger of collision greater, and therefore imposed on the plaintiff the duty of at least cautioning the driver to be careful. There was no evidence that he did this, and he was accordingly held not to have freed himself from the suspicion of negligence. Similarly, in the Pennsylvania case, the plaintiff knew that he was approaching the crossing at a fast trot, (in other words, that the driver was acting negligently,) and yet took no precautions himself. But there was no effectual precaution he could have taken, except to remonstrate with the driver. Here, then, lies the distinction. If the passenger looks for a train, when approaching a crossing, or requests the driver to go carefully, he has done all he can do, and cannot be charged with personal negligence. If he neglects to do so, he is so chargeable. Now, in the *Howe* case, the evidence showed that the plaintiff did look and saw nothing; so that the case is different in that respect from the two last cited from New York and Pennsylvania, and there is therefore no conflict between them.

According to a recent decision of the Supreme Court of Pennsylvania, farms purchased and permanently used by a hospital for hospital purposes, as part of the hospital plant, and as an open air sanitarium, in actual operation for such purposes, are exempt from taxation as a part of the hospital property, though separated from the main hospital, used for hospital purposes only during the summer months, and operated incidentally for profit in order to reduce expenses: *Contributors to Pennsylvania Hospital v. Delaware Co.*, 32 Atl. Rep. 456.

Taxation,
Exemption,
Hospital
Farms

Judge CHITTY, of the Chancery Division of England, has lately held, that a child *en ventre sa mère* is to be considered as living so as to vest in the parent on the death of the life tenant a devise made by a testator to A. for life, and on her death to the parent of the child, "for her absolute use and benefit in case she has issue living at the death" of A., "but in case she has no issue then living," then over, when the parent was *en ventre* at the time of A.'s death: *In re Burrows*, [1895] 2 Ch. 497.

Devise, WILL,
Issue Living,
Child en ventre
sa Mère

THE ULTIMATE SOURCES OF THE DEVELOPMENT OF THE LAW.

By WM. DRAPER LEWIS, Ph.D.

In the paper on "Law and Sovereignty," I tried to point out that custom was the root of all law, and that the enforcement of a custom, or definite rule of action on an individual member of a community depended on the fact that back of the officer who enforced the law was the active desire, or acquiescence, on the part of the brute force of the community that it should be enforced. Law, therefore, can be said to have its ultimate reason for being in the desire of the community that it should be. Jurisprudence, however, is not static, but dynamic. At any one time the law is fixed, but as the ideas and desires of men which lie at the foundation of the law never remain from one generation to another exactly the same, so law, which is but the outward expression of these ideas and desires, also modifies and changes. The ultimate sources of the law's development which I wish to touch on in this paper are the causes which affect the ideas and desires of man.

Now, the springs of human ideas and consequent desires and actions are co-extensive with the universe. Nothing that exists for man, no principle of his own nature or fact of the external world, is without its influence on him, and through him on that which he desires and does. The ultimate sources of law, or the rules of conduct followed by men, are to be found in the combination of their mental characteristics and tastes with the physical facts of nature by which they are surrounded.

I desire to take up three examples: one to show the effect of differences in physical environment on law, another to show the effect of differences in character, and a third to illustrate the effect of changes in taste, or capacity for pleasure and pain.

Physical differences, that is, differences of soil, climate, etc., are the most fruitful sources of differences in the legal conceptions of primitive peoples. Differences in the climate of the different states of the United States have practically but little effect on their laws. But among primitive peoples there is little or no commerce. They live off of the products of the soil in their immediate vicinity. The conditions of production and the conditions of climate and soil in their neighborhood make the total of their physical environment. With us all parts of the earth minister to our pleasure, and our physical environment is co-extensive with the climate and soil of the world itself. All civilized peoples—the peoples of Western Europe and America—have practically the same physical conditions, or rather, they have practically the same conditions as compared with the widely different conditions which confront primitive peoples in different parts of the globe. This difference in physical environment of the ancestors of modern European nations, and those other branches of the Aryan stock which moved into India, is the reason, I believe, not only for some of the fundamental differences in the civilization of the two nations, but for the radical difference in some of their most elementary legal conceptions.

To take an example. The basic idea of our law to-day is, our conception of private property,—the absolute control of the individual man or woman over the land or goods which are his or her own. This conception of the right of private property depends on our idea of the individual as a separate unit apart from the other members of the community, or of his own immediate family.

If this emphasis of the individual, as we may call it, did not exist, individual property, in its modern legal sense, could not exist. The characteristic feature of those people who are in an earlier stage of social development is communism. It is not the modern communism where each shall stand equal politically, socially and economically, but a communism which resulted from the fact that the individual life, as we know it, did not exist. Society was not resolved into individual units. The community and the family were the units on which obli-

gations rested, and by which rights were possessed. As a consequence, land was held in common by the whole community, while cattle were the property, not of the individual, but rather of the family. The difference between India and Europe to-day is simply that the West has moved more rapidly away from this primitive communism and towards individualism. The difference in the rate of development is marked in the differences which surround the law of property. Thus, in India, as a rule,¹ at the time of the English occupation, while personal property in the local village communities was held by individuals or by families, and land was held in severalty, that is, by distinct individuals or families, property could not be conveyed except with the consent of what we might call the village council. The main cause of this relative backwardness in legal development was, I believe, entirely climatic or physical. Owing to the climate, land in India was easily cultivated. Land, as such, was therefore the chief item of wealth. The mere possession of land meant riches.

On the other hand, the climate of Europe made the land, especially to a primitive people, hard to cultivate. Land was not of itself so much to be desired as the means to cultivate it. Cattle for the purpose of tilling the soil was, therefore, the chief item of wealth. This difference between the chief items of wealth had a two-fold effect. In the first place, ideas of individual ownership could grow up more readily around the cattle, which were reared by the individual man, than around land which no man made and which no labor could increase. The difference, however, would, perhaps, never have created individual property had it not been for another characteristic of cattle as property. The cattle of one community could be driven off by members of the neighboring community. Wherever among Teutonic peoples we find survivals of an earlier mode of life, cattle stealing seems to be the most prominent crime. The borderland between Scotland and

¹ It must be borne in mind not only that India is an expression covering a multitude of peoples with distinct customs, but the Anglicizing of Indian legal ideas is in active progress.

England, and parts of the Scotch Highlands, down almost to the last century, are good examples of this; while there must have been generations of petty raids by one small community on another before the "nation devoted to arms," which Cæsar and Tacitus observed, could have been developed.

In India, on the other hand, nothing could be gained by conquest except the exaction of a tribute of a portion of the products of the soil from the conquered people. This kind of conquest involves a degree of organization on the part of the conqueror, which is only observed among early races when the necessity of a prolonged migration presents itself. After the migration of a branch of Aryan stock to India, therefore, they seemed to have settled down in villages and become essentially a peace-loving people. As such, they were exposed to the more warlike tribes of the North. Before the English occupation, India seems to have been subject to a series of invasions—Mohammedans, Emperors of Delhi, the Mahratter Brigands and the Sheks, one after another fostered their dynasties on the country. The conquerors, however, left the life of the village community undisturbed, simply exacting a quota of the produce for the support of their armies. The total result, whether I have rightly described its cause or not, was the war-loving characteristics of the West, and the essential love of peace in the East.

Now, however, disastrous to their present happiness was the constant fighting of the Teutonic peoples—it certainly developed the individual as such. It was the individual who lead in battle, not the family. War required personal leaders, and the leader, for himself, seems from the first to have demanded a large share of the spoil. The most casual observation of German tribal life shows the individualism that is cropping out among the essentially communistic character of the community as a whole, and these individualistic features are all connected with war. The land is divided equally for the purposes of cultivation among the families; but the individual boy is invested with a shield and spear before the assembled host, and thereafter takes his place as a man among his fellow men. This impetus to individual life and action,

and the struggle for existence, and the personal ambition which came with it, is, I believe, the keynote to that greater progress of the West which has as one of its results our peculiar ideas of individual property.

Having thus seen how physical differences may affect the development of law, let us take an illustration of the effect of differences of character.

It has always been a source of interesting speculation why some nations excel others in particular lines of mental development. Why, for instance, among all ancient peoples did the Roman have the legal faculty? His art he borrowed from Greece, his later administration from Persia and the East, but his law was the native product of his own genius. It enabled him not only to conquer, as the Greek Alexander, but to civilize. Perhaps no great achievement of any people—as the art and poetry of Greece, the self dependence of the Saxon has only one cause. But if one thing more than another made the Roman the law-giver of the world it was his sense of honesty combined with his conservatism. Many an incident in the history of early Rome may make us wonder at such a statement. But remember that it is only by comparison that we must judge a people. Ethical ideas are always slow growth, but the one which finally took possession of the Roman with greater tenacity than any other was the sacredness of the spoken word. We see the same trait in the great law-giving nation—the Anglo-Saxon. It is true of no other people. Homer is evidence of the ethical importance of truth and honesty to the primitive Greek. The duplicity of Ulysis is held up to even greater admiration than the bravery of Achilles. To peoples who inhabit what we vaguely call the East, lying seems to be a moral necessity. One of the most hopeless tasks of the missionary in India is to inculcate Western ideas of truth.

Now, to the development of law, the conception of the obligation of an agreement between man and man is essential. Until this obligation is firmly rooted in the mind, law necessarily remains in the infancy of its development. And yet, the force which creates the obligation of the contract is the

sacredness of the spoken word. Where this is not held sacred, the obligation to perform an agreement must rest, where it exists at all, in the form in which the agreement was made, and the law must be full of technicalities and absurdities. The law of contracts, or the conceptions which gather round the contract between man and man, and how far the state will enforce the same, or the sanction for its non-performance, all this has had its origin in those characteristics of the English and the Roman mind, which caused them to place truthfulness as perhaps the central virtue of their code of ethical ideas, and, therefore, in time, necessarily to look behind the form of the agreement to the intent of the parties. It was the effort to work out the true intent of agreements that ultimately made the Roman law almost the perfection of reason. To-day the vast majority of the relations of men in society is a contractual relation, or one based on contract—on the sacredness of the spoken word. It was the lack of this desire for truth which prevented more than anything else, the legal development of other ancient civilizations placed in the same physical conditions as the Romans.

But after all, that which as much as anything else lies back of civilization's development and the development of legal ideas, is man's capacity for pleasure. This may seem a somewhat novel proposition. Few of us, I believe, realize the effect of the character of a nation's desires on its development. But a single question will bring into prominence the real importance of the desire in shaping the trend of our civilization. The world at present is full of socialistic ideas and theories. But if the pleasures of man are mainly derived from the personal service of his fellow man, socialism as at present conceived is out of the question. It is a plan of civilization which omits the satisfaction of pleasure now ministered to by servants. Yet man will have what he wants, and his customs and his ideas will conform themselves to those wants, and any theory of the organization of society must satisfy the desires of man as they are. The more civilized man becomes, the greater his power over nature, and the greater his range of choice, the more important to his development becomes the character of the thin-

he chooses. In order to show that this is not a mere speculation, I will point to a specific instance of the effect of certain desires on custom and law. We all know that Roman society, in the later Republic, and well down into the Empire, was built largely on slavery. Why was this? The answer, I think, lies in the fact that the capacity of the Roman for pleasure was largely administered to by personal services. The bath and its attendants, the consumption of his meals, the sights in the arena, made up a large portion of his pleasures. This required the implicit obedience of unskilled laborers. To show that this gave the impetus to slavery, and all the legal conceptions which gather around it, we have but to point out that, as the Roman grew to love beautiful things which could not be produced by unskilled laborers, there grew up in Rome a class of free laborers, painters, architects, etc., and a class of intelligent slaves. All through the decadence of the Empire, the position of the slave is becoming better and better. At first the master is restrained from beating his slave severely, killing him is practically made murder; then a slave, under certain conditions, can own property and is thus enabled to purchase his own freedom; and finally slavery, as the early Empire knew it, practically vanished from Roman civilization,—a change which is, of course, hastened by the ethical ideas cultivated by Christianity, but which was almost necessary as the result of developing tastes. If the slaves in the body politic must, from the nature of their work, possess individual skill, the end of their personal slavery is only a question of time. It is not from the tiller of the soil of mediæval Europe, but from the unskilled maker of armor and his apprentices, that our ideas concerning the legal rights of employer and employed have arisen¹. As a result of developing tastes and the progress of invention and changes in production, the old status of master and slave gave way to the modern theory of a contractual relation. So great indeed is the reaction from the old condition that the principal class of contracts which courts will not specifically enforce is the contract of personal service.

In this connection, one may be permitted to make an

¹ I speak of industry rather than domestic service.

attempt at prophecy. We should say that the continuance of the idea that government is the preserver of the peace of the community, and not a producer, which is a prominent characteristic of our present civilization, depends largely on whether the pleasures of man can, in the future, be satisfied by individual effort, or whether the character of our tastes will involve, to a much greater degree than at present, the necessity for the united action of the whole community in order that they may be gratified. However, this is apart from our present object, which is simply to illustrate the fact that ideas and customs, and consequently rules of human action or law, are not *a priori* and fixed conditions, but the result of growth; and that, as the whole environment of man makes man what he is, no part of that environment is without its effect on his law. Again, as man gains in his power to subject nature to his own desires, and as ethical ideas with advancing civilization take a firm and ever firmer hold on character, to a large extent we must look for the future development of legal ideas from a modification of our ideas of those things which we consider pleasurable.

DEPARTMENT OF INSURANCE.

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BURLINGTON INSURANCE CO. v. THRELKELD.¹ SUPREME COURT OF ARKANSAS. MAY 18, 1895.

Plaintiff, having taken a policy providing that the chattels insured should remain in the building where they were when the policy was issued, was permitted by the company's agent to remove the goods to another building, and the insurance was continued in the new place by a written clause attached to the policy by such agent. There was evidence that the agent was accustomed to grant such permissions, reporting the same in each case to the company, on blanks furnished by it for that purpose. *Held*, sufficient to show authority of the agent to grant such permission.

Where an insurance agent had authority to waive certain conditions in the policy, the exercise of such power, after his agency has been revoked, will bind the company, if the party dealing with him had no notice of the revocation.

THE AUTHORITY OF AN INSURANCE AGENT.

The business of insurance in its various forms and under various names is, at the present day, transacted, we might say, exclusively by corporations, the percentage of that done by co-operative or mutual companies being comparatively nominal. In the nature of things, therefore, it is patent at first blush that the transactions with these insurance corporations or companies, must be negotiated and perfected by agents of more or less extensive authority. A successful operation of the insurance business, necessarily requires that the company have its army of agents throughout the territory where its operations are carried on. Like officers of the army or navy, some of these agents outrank the others. Some are superior, some inferior. Some serve agents above them, others direct the service of those under them. Some are com-

¹ Reported in 31 A. W. 565.

stituted for the purpose of adjusting losses, or for superintending and establishing agencies, or they may be general agents having practically unlimited authority within the territory assigned them. Yet others are recording, canvassing, surveying and soliciting agents, the latter class usually working under a superior general agency. Inquiry will be directed chiefly to the live questions which arise in every day practice with reference to the authority of all these various grades of agencies, and the consequences of their acts, knowledge, etc., on the respective companies which they represent. The recording agent is usually furnished, by the company appointing him, with policies signed in blank by the chief officers of the company, blanks for various kinds of indorsements, blotters, advertising matter, etc. His real duty ordinarily is to write and countersign policies, make indorsements and sundry permits for additional insurance, change in the rate or hazard, etc., etc. His acts in this connection bind the company from the instant they are done as effectively as though done by the controlling officers of the corporation.

The soliciting, canvassing or surveying agent, is one sent out by the general agent to solicit insurance for the companies which he represents. His actual authority is usually to solicit and examine risks, report on the general status and desirability of any risk proposed, the moral and physical hazard connected therewith, and in general the desirable or unfavorable features of the offered risk. He is usually supplied with blotters advertising the merits of his company and similar advertising literature, but has no actual authority to sign policies, make indorsements permitting additional insurance, or greater hazard by reason of a change in the location of the property covered, or increase of risk from whatsoever source. He usually delivers the policy when it is sent him for delivery by his principal, collects and accounts to his principal for the premium, and is paid a commission for his services. His commission, in fact, is usually exactly the same as that received by local recording agents, and his duties, so far as appearances are concerned, are practically the same as those of the latter, except that the soliciting agent does not write any policies nor

make any indorsements thereon, this being done upon his advice and for him by the general agent who employs him. These two general kinds of agents will be distinguished as soliciting and recording agents. The recording agent, having power to bind his principal by an indorsement, he may, for his principal, waive any provision of the policy, or estop the company from relying on any provision which he could, as recording agent, alter or permit by an indorsement. He reports to his principal his acts done in his line of duty, and the company, upon this report, either ratifies or repudiates those acts. Of course this repudiation does not affect any one whose rights are at stake until notice of the repudiation by the principal is brought home to him. For instance, the recording agent might write a policy for an amount greater than his private instructions would warrant, but unless the assured had notice of this limitation, the company will be bound.

It is a general principle of agency that the acts and knowledge of the agent done and ascertained to be within the scope of the real or apparent authority of such agent will, in law, be held to be the acts and knowledge of the principal so far as the rights of third parties, who are ignorant of the restrictions of the authority of the agent, are concerned. Thus, an agent, having authority to make the usual indorsements and permits for the company, has authority to permit the removal of insured goods to another building, although the policy forbids such removal without permission indorsed, and the company will be bound by the consent of the agent, although the fact that the agent consented was never made known to the company or ratified by it: *Burlington Ins. Co. v. Threlkeld*, (Ark.), 31 S. W. 265. And the exercise of the authority of such agent will be binding even after that authority has been expressly taken away by the company, the assured having no knowledge of such revocation: *Id.* When an agent has mailed his usual report of his acts, the law will presume that it was received by the company in the absence of a showing to the contrary. Notice and proof of loss may be waived by parol, but this cannot be waived by a local recording agent of the company, as it is not within the real or apparent scope of

his agency: *Burlington Ins. Co. v. Kennerly*, (Ark.), 31 S. W. 155. The recording agent has authority to strike out certain provisions of a policy upon the same being objected to, and bind the company by the policy with such provisions stricken out: *Parsons v. Ins. Co.*, (Mo.), 31 S. W. 117. And where the policy provides that if the assured did not own the land upon which the insured building was situated, this fact must appear in writing on the policy, or it will be void, but the agent of the company who wrote the policy, having known all the facts and bound the company with such knowledge, it was held that the company was estopped from insisting on the forfeiture: *Id.* And this is the rule, though the policy stipulates that additional insurance or increase of hazard, or other change in the status of the insured property, be indorsed on the policy in writing: *Parsons v. Ins. Co.*, (Mo.), 31 S. W. 117. These provisions, being inserted in the policies for the benefit of the companies, they are not compelled to insist on them, but may waive them, and a recording agent with authority to make the necessary indorsement may waive the requirement with like force and to the same effect as could the company: *Burlington Ins. Co. v. Kennerly*, 31 S. W. 155. And the fact that the recording agent fails to transmit to his principal a copy of his indorsement on the policy permitting a removal of the property covered, additional insurance or other consent for a change of the status of things, and the company is thereby kept in ignorance of the acts of its agent, and though such conduct on the part of the agent be in direct disregard of the instructions of his principal, yet the assured cannot be thereby prejudiced in any of his rights under the policy, as the neglect of the agent is a failure to perform a duty he owed to his principal and not to the assured, and the company will be bound by such acts, and must suffer the consequences of the agent's neglect of duty and violation of instructions: *Glouster Mfg. Co. v. Ins. Co.*, 6 Gray, (Mass.), 497; *Potter v. Ins. Co.*, 63 Fed. 382. And a recording agent may waive a provision of a policy requiring the payment of the premium as a condition precedent to the taking effect of the insurance: *Ball & Sage Wagon Co.*, 20 Fed. 232. The acts of the agent

having authority to collect the premium binds the company in all he does in reference thereto, and where by its course of business the company makes it a custom to look to the agent for all premiums, whether collected by him or not, the policyholders becoming liable to the agent therefor, this is tantamount to a payment by the assured, and the fact that such agent may neglect to collect or account for the premium will, in no way, invalidate the policy, even though it contain an express stipulation that it shall not be binding until the actual payment of the premium: *Elkins v. Ins. Co.*, 6 Atl. 224; *Lebanon Mut. Ins. Co. v. Humes*, 113 Pa. 591, 8 Atl. 163; *Alexander v. Ins. Co.*, 67 Wis. 422, 30 N. W. 727. And this is true, also, although the agent is guilty of violating his duty to collect and forward the premium by reason of his being merely a broker employed by the assured to obtain the insurance, and acts for the company only in delivering the policy and collecting the premium therefor: *Universal Fire Ins. Co. v. Black*, 109 Pa. 535, 1 Atl. 523. And where the broker or other collecting agent himself pays the premium on a policy sent him for collection and looks to the assured for the amount, the company will be bound by such payment, though the assured do not really pay the broker until after a loss, if at all: *Lebanon Mutual Ins. Co. v. Erb*, 112 Pa. 149, 4 Atl. 8; *Continental Life Ins. Co. v. Ashcraft*, 3 Atl. 774. In such cases, the agent to collect the insurance premium has satisfied himself as to its payment, and when he is satisfied about the payment of the premium, having been entrusted with a proper adjustment of the same, the company for which he acts is in no position to complain: *Scott v. Ins. Co.*, 53 Wis. 238, 10 N. W. 367; *Newark Machine Co. v. Ins. Co.*, 50 Ohio, 549, 35 N. E. 1060. On the same principle the agent to collect the premium may even grant a longer time within which it may be paid than he is expressly authorized to do: *Farnum v. Ins. Co.*, 83 Cal. 246, 23 Pac. 869.

A recording agent who has authority to countersign and issue policies has authority to bind his principal by an oral contract of insurance. So, where such an agent orally agrees with an applicant that the insurance shall take effect at once

or at some certain time, the policy to be issued and delivered as soon as practicable, such a contract will bind the company, which will be liable for a loss occurring after such an agreement and before the policy is reduced to writing and delivered: *The Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; *Davenport v. Ins. Co.*, 17 Iowa, 276; *Audubon v. Ins. Co.*, 27 N. Y. 216; *Commercial Mutual Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318; *Angell v. Ins. Co.*, 59 N. Y. 171; *Fish v. Cottinet*, 44 N. Y. 538; *Hardwick v. State Ins. Co.*, 23 Or. 290, 31 Pac. 656; *Potter v. Ins. Co.*, 63 Fed. 382; *North British & Mercantile Ins. Co. v. Lambert*, (Or.), 37 Pac. 909; *King v. Heckla Ins. Co.*, 58 Wis. 508, 17 N. W. 297. And this is the case, although there be no definite agreement about the amount of premium or when it shall be paid: *Audubon v. Ins. Co.*, 27 N. Y. 216; *Harron v. Ins. Co.*, 88 Cal. 6, 25 Pac. 982. The agent can make a valid parol contract of insurance just as the company itself could: *Sanborn v. Ins. Co.*, 16 Gray, (Mass.), 448. And a stipulation in the policy to the effect that it will not be binding until countersigned by the agent will not effect the binding force of such oral contract: *Post v. Ins. Co.*, 43 Barb. 351. Nor need it be affirmatively shown that the agent had authority to bind his principal by a parol agreement: *Stickley v. Ins. Co.*, 37 S. C. 56, 16 S. E. 280. Likewise, where the agent agrees that the company shall be bound from the time the premium is paid, it will be liable for a loss before the policy is actually issued, but after the payment of the premium: *Knox v. Ins. Co.*, 50 Wis. 671, 7 N. W. 776; *Knox v. Ins. Co.*, 50 Wis. 680, 7 N. W. 780.

Policies of insurance usually contain a stipulation substantially as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." Frequently in litigation this and other named causes of forfeiture are set up by the companies in avoidance of an action on the policies. And, as a general rule, such stipulations are upheld

and a violation of the requirements are fatal. But, on the other hand, the fact that the agent issuing the policy may have been fully apprised of all the facts material to the risk in apt time, and that he issued the policy with full knowledge of the facts which otherwise would incur a forfeiture, is likewise often set up by the plaintiff to defeat the forfeiture. Then the question arises, what is the effect of such knowledge of the agent on the contract of insurance? The trend of the decisions is unquestionably to the effect that such knowledge of the agent, obtained in connection with the taking and negotiating for the insurance and by the insured in good faith conveyed to the agent, as such, will be held to be the knowledge of the company, and the company will not be permitted to claim a forfeiture of a policy on the ground of the existence of a fact which would avoid the policy, when, at the time of issuing the policy, the company, either directly or through its authorized agent, had knowledge of such fact. Nor can the force of this proposition be weakened by a stipulation in the policy to the effect that the agent taking the insurance shall be deemed the agent of the assured and not of the company: *St. Paul Fire & Marine Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240; *Follitt v. Ins. Co.*, 107 N. C. 240, 12 S. E. 370; *New Orleans Ins. Assn. v. Mathews*, 65 Miss. 312, 4 So. 62; *Ins. Co. v. Wilkinson*, 13 Wall. 222; *Travellers' Ins. Co. v. Harvey*, 82 Va. 949, 5 S. E. 553; *O'Brien v. Ins. Co.*, 52 Mich. 131, 17 N. W. 726; *Kahn v. Ins. Co.*, 34 Pac. 1059; *Eilenberger v. Ins. Co.*, 89 Pa. 464; *Wheaton v. Ins. Co.*, 76 Cal. 415, 18 Pac. 758; *Indiana Ins. Co. v. Capchart*, 108 Ind. 270, 8 N. E. 285; *Rowley v. Ins. Co.*, 36 N. Y. 550; *Kansal v. Ins. Co.*, 31 Minn. 17; *Ins. Co. v. Norton*, 96 U. S. 234; *Stone v. Ins. Co.*, 68 Iowa, 737, 28 N. W. 47; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Masters v. Ins. Co.*, 11 Barb. 624; *Peoria Fire & Marine Ins. Co. v. Hall*, 12 Mich. 202; *Meyers v. Ins. Co.*, 156 Pa. 420, 27 Atl. 39. In *Planters' Ins. Co. v. Meyers*, 55 Miss. 479, 499, the policy sued on contained this provision: "It is a part of this contract that any person, other than the assured, who may have procured this insurance to be taken by the company, shall be deemed to be the agent of the

assured . . . and not of this company under any circumstances whatever, in any transaction relating to this insurance." The court in a very able and convincing opinion held that such a stipulation could not change the real status of the agency, and that the acts and knowledge of the agent were nevertheless chargeable to the company. Passing upon a similar provision in a policy, the Supreme Court of Arkansas says: "The fault rests with the solicitor; to whom shall it be imputed? He acted on behalf of the company and it accepted the fruits of his work; but it is said that he was a 'solicitor' and not an 'agent' of the company, and that the application recited that in writing out answers to questions in it and preparing a diagram, he acted as the agent of the insured. For convenience in the conduct of its business the company may make the above classification of its agencies, but it cannot disown any one by classifying them. Neither can its declaration override the facts, nor a fiction dissolve existing relations;" *Spratt v. Ins. Assn.*, 53 Ark. 216, 222, 13 S. W. 799. Again, it was held in *Home Ins. Co. v. Gibson*, (Miss.), 17 So. 13, that a stipulation in a policy as follows: "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by its terms may be the subject of agreement endorsed hereon or added hereto," will not preclude the company from estopping itself by the acts or knowledge of its agent. The court quoted with approval the following language of the Supreme Court of Michigan in the case of *Ins. Co. v. Earle*, 33 Mich. 143: "There can be no more force in an agreement in writing not to agree by parol, than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it." This language also received approving sanction in *Morrison v. Ins. Co.*, 69 Tex. 353, 6 S. W. 605; *Lamberton v. Ins. Co.*, 39 Minn. 129, 39 N. W. 76; *Kahn v. Ins. Co.*, 34 Pac. 1059, and other cases. To same effect see *Mut. Benefit Life Ins. Co. v. Robinson*, 58 Fed. 723; *Mix v. Ins. Co.*, 32 Atl. 460. An apparently contrary doctrine seems to prevail in Vermont: *Smith v. Ins. Co.*, 60 Vt. 682, 15 Atl. 353. But the reasoning of the case is well met by that of

Lamberton v. Ins. Co., supra, wherein the court says: "The restriction here is so broad that it applies alike to every officer, agent or representative of this company, and, as a corporation can only act through such agencies, the substance of the provision under consideration is that the company shall not be held to have waived any of the terms or conditions of the policy. That is to say, in other words, that one of the parties to a written contract, which is not required by law to be in writing, cannot, subsequent to the making of the contract, waive, by parol agreement, provisions which had been incorporated in the contract for his benefit. A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the consent of the other party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract." This is self-evident. The clause of this policy relied upon as expressly restricting the power of the agent whose conduct is here in question, is of that character. If it is effectual at all, as a limitation on the power of future action, it limits the power of every agent, officer and representative of the company, and hence, practically, that of the corporation. It is no more applicable to this particular agent than to all of those to whom the conduct of affairs of the corporation is committed. In that broad scope, and as applicable to all the representatives of the corporation, it cannot be enforced so as to render inoperative such subsequent action or agreement of corporate agents as would, if it were not for this clause in the contract, be deemed the effectual action or agreement of the corporation.

This reasoning is unquestionably forcible. Suppose an insurance corporation, by resolution or other proper action of its board of directors, should delegate to a certain person the general and exclusive control and management of its business. Such person could of course bind his principal in all matters pertaining to contracts of insurance with his company. But suppose that this person should have inserted in all policies of his company a clause similar to the one considered by the Minnesota court. Suppose a loss occurs. A controversy

arises over the amount due or over other matters. The policy may limit the time within which an action thereon may be brought to six months. The general manager may inveigle the assured into deferring a suit by promises and assurances that the claim will be settled without a resort to the courts. The assured knows that the manager has general authority, imposes confidence in his assurances and suggestions, and negotiations for a settlement pends until it is too late to bring the action. Is there a court of last resort in the land that would not hold the company, by the acts of its general agent and manager, estopped from taking advantage of the six months limitation provided in the policy, or, for like reasons, any other conditions imposing a forfeiture where the assured is in no sense at fault, and the agent dealing with him wholly so?

In harmony with this contention, it is held that where the agent writing the policy at the time of negotiating for the insurance has knowledge of other insurance which, according to the stipulations of the policy, would render it void, and nevertheless accepts the risk, writes and delivers the policy and collects and retains the premium with such knowledge, this knowledge will be chargeable to the company, and it cannot take advantage of the clause in the policy forbidding the other insurance: *Collins v. Ins. Co.*, 79 N. C. 279; *Haruthal v. Ins. Co.*, 88 N. C. 71; *Union Ins. Co. v. Murphy*, 4 Atl. 352; *Palmer v. Ins. Co.*, 44 Wis. 201; *Miller v. Ins. Co.*, 70 Iowa, 704, 29 N. W. 411; *Kahn v. Ins. Co.*, (Wyo.), 34 Pac. 1059; *Carrugi v. Ins. Co.*, 40 Ga. 140; *Hammond v. Ins. Co.*, 62 N. W. 883, reversing 60 N. W. 1095; *Russell v. Ins. Co.*, 55 Mo. 585; *Pitney v. Glenn's Falls Ins. Co.*, 65 N. Y. 6; *Anderson v. Ins. Co.*, 63 N. W. 241; *Pechiner v. Ins. Co.*, 65 N. Y. 195; *Ins. Co. v. Earle*, 33 Mich. 143; *Beebe v. Ins. Co.*, 93 Mich. 514, 53 N. W. 818; *Rockford Ins. Co. v. Farmer's State Bank*, 50 Kan. 427, 31 Pac. 1063; *Shafer v. Ins. Co.*, 53 Wis. 361, 10 N. W. 381; *Capitol Ins. Co. v. Bank of Pleasanton*, 50 Kan. 449, 31 Pac. 1069; *Fire Assn. v. Laning*, (Tex. Civ. App.), 31 S.W. 681; *Sprott v. Ins. Co.*, 53 Ark. 215, 13 S.W.

799; *Crescent Ins. Co. v. Camp*, 71 Tex. 505, 9 S. W. 473; *Harriman v. Ins. Co.*, 49 Wis. 71, 5 N. W. 12; *Eagle Fire Ins. Co. v. Globe Loan & Trust Co.*, 62 N. W. 895; *Gaus v. Ins. Co.*, 43 Wis. 108; *Mutual Reserve Fund Life Assn. v. Sullivan*, (Tex. Civ. App.), 29 S. W. 190; *Burson v. Fire Assn.*, 136 Pa. 267, 20 Atl. 401; *Haire v. Ins. Co.*, 93 Mich. 481, 53 N. W. 623; *Liverpool, London & Globe Ins. Co. v. Sharff*, 71 Miss. 922, 16 So. 307; *Home Ins. Co. v. Gibson*, (Miss.), 17 So. 13; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016. This is the rule, too, though the application for the insurance expressly stipulate that "the applicant hereby declares and warrants that the above answers are true and no statement contradictory to the above was made to or by the agent of the company, and he agrees that this declaration should be the basis of and form part of the contract or policy between the assured and the company:" *Robinson v. Ins. Co.*, 93 Mich. 553, 53 N. W. 821; *Becke v. Ins. Co.*, *supra*. The law makes it the duty of the agent to disclose to his principal all facts of which he may have knowledge and which affect the risk, and if he fail to do so, the company—not the assured—must abide the consequences: *Harriman v. Ins. Co.*, 49 Wis. 71, 5 N. W. 12; *Hamilton v. Ins. Co.*, 15 Mo. App. 59.

Where the company is advised of the additional insurance, either by reason of its own knowledge of the facts, or through the knowledge of its agent, chargeable to it, it must, either itself, or through its agent object to such other insurance and cancel the policy and return the assured his proper proportion of the premium. Failing to do which, the company will be estopped from setting up a forfeiture: 40 Mo. 557. "The object of requiring leave to take insurance in another company to be indorsed on a policy is to give notice of the additional policy, and where the same agent represents both companies and recommended and issued the additional policy, the original company cannot set up such failure of indorsement as a defense to a suit on its policy." *Russell v. Ins. Co.*, 55 Mo. 585. And parol evidence is admissible to prove a waiver of such condition, though the policy require the permission to be in

writing: *Pechner v. Ins. Co.*, 65 N. Y. 195; *Wilkinson v. Ins. Co.*, 13 Wall. 222; *American Central Ins. Co. v. McCrea, Mary & Co.*, 8 Lea, (Tenn.), 513, 523. If there be a controversy as to whether the agent waived the notice or not, or whether he had knowledge of facts which would imply a waiver, the matter on this issue would resolve itself into a question of fact for a jury to determine: *Pitney v. Glenn's Falls Ins. Co.*, 65 N. Y. 6.

The general rule is, also, that a company will be liable for the fraud or mistakes of its agents, and where an agent issued a policy for three years by mistake when it was only intended that it should remain in force one year, which was delivered to the assured as written, and he accepted it in good faith, not knowing that the agent had made a mistake, and was not apprised of such mistake until after a loss, it was held that the company was liable for the loss suffered within the three years, though after one year: *Dwelling House Ins. Co.*, 153 Pa. 324, 25 Atl. 757. And where an insurance company has knowledge of the true title of the assured, but its agent through mistake writes the policy for the full value of the fee in the land, instead of the actual interest of the assured, which was correctly stated in the application to be only a life estate, the company will be liable on the policy as written, and will not be permitted to set up the mistake of its agent to defeat a recovery: *Michigan Mut. Life Ins. Co. v. Leon*, (Ind. Sup.), 37 N. E. 584; *Welsh v. London Assur. Corp.*, 151 Pa. 607, 25 Atl. 142; *Creed v. Sun Fire Office*, (Ala.), 14 So. 323; *Dailey v. Prof. Mut. Acc. Assn.*, (Mich.), 57 N. W. 184; See, also, *Manhattan Ins. Co. v. Webster*, 59 Pa. 227; *Bourgeois v. Ins. Co.*, 86 Wis. 402, 57 N. W. 38. So, where an agent issues a policy, knowing of incumbrances or liens on the property in violation of the provisions of the policy, such incumbrances cannot be set up as a defense to an action on the policy: *Shefer v. Phoenix Ins. Co.*, 58 Wis. 351, 10 N. W. 381; *Harriman v. Ins. Co.*, 49 Wis. 71, 5 N. W. 12; *Harrington v. Ins. Co.*, 66 Hun, 628, 21 N. Y. 31; *West Coast Lumber Co. v. Ins. Co.*, 98 Cal. 502, 33 Pac. 258; *Equitable Fire Ins. Co. v. Alexander*, (Miss.), 12 So. 25; *Hartford Fire*

Ins. Co. v. Haas, 87 Ky. 531, 9 S. W. 720; *Home Ins. Co. v. Gibson*, 17 So. 13. On the same principle a warranty in a policy requiring a clear space to be maintained between the property insured and other property will be regarded in law as waived where the agent who writes and delivers the policy is cognizant, at the time, of the want of such space (*Liverpool, London & Globe Ins. Co. v. Lumber Co.*, (Miss.), 17 So. 445), and the onus is on the insurer to establish a breach of the warranty: *Id.* An agent having authority to countersign and deliver policies, has also authority to waive a requirement of the policy that the assured shall keep his books and inventories in a fireproof safe: *Niagara Fire Ins. Co. v. Brown*, 123 Ill. 356, 15 N. E. 166. And if the property be vacant, at the time of writing the insurance, to the knowledge of the agent, it will be binding: *Rochester Loan & Banking Co. v. Ins. Co.*, 62 N. W. 877.

There are a few cases which hold that where the policy of insurance itself limits the powers and authority of the agent issuing the policy to certain definite and specified acts, and expressly repudiates his authority as to all other acts, that this is notice to the assured accepting the policy of the limitations placed on the authority of the agent, and the assured will not be protected in relying on any oral waiver or assurances of the agent in any other matters pertaining to the insurance contract or matters that may affect it either presently or subsequently, which are not embodied in the express authority conferred, or which are forbidden by that expressly withheld: *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 32 N. W. 660; *Hankins v. Ins. Co.*, 70 Wis. 1, 35 N. W. 34; *O'Reilly v. London Assur. Corp.* 101 N. Y. 575, 5 N. E. 568; *Kyle v. Com. Union Assur. Co.*, 144 Mass. 43, 10 N. E. 518; *Enos v. Ins. Co.*, 67 Cal. 621, 8 Pac. 379. It is otherwise, however, where there is no express stipulation in the policy that the agent may not waive any of its conditions: *Silversberg v. Ins. Co.*, 67 Cal. 36, 7 Pac. 38; *Schoerner v. Ins. Co.*, 50 Wis. 575, 7 N. W. 544; *Alexander v. Ins. Co.*, 67 Wis. 422, 30 N. W. 727; *O'Brien v. Ins. Co.*, 22 Fed. 586; *Cohen v. Ins. Co.*, 67 Texas, 325, 3 S. W. 296; *Ball and Sage Wagon Co. v. Ins.*

Co., 20 Fed. 232. But certainly none of these cases could be construed as holding that an insurance company can completely shear its agent of authority and at the same time accept his services as agent, and the results of the duties necessarily incumbent on him as such. If they do, it suffices to say that they are in the very teeth of the great weight of modern authority, contrary to reason, and not sustained by principle: *Beebe v. Ins. Co.*, 93 Mich. 514, 53 N. W. 818; *Ins. Co. v. Earle*, 33 Mich. 143; *Rockford Ins. Co. v. Farmers' State Bank*, 50 Kan. 427, 31 Pac. 1063; *Shaffer v. Ins. Co.*, 53 Wis. 361, 10 N. W. 381; *Capital Ins. Co. v. Bank of Pleasanton*, 50 Kan. 449, 31 Pac. 1069; *Kahn v. Ins. Co.*, (Wyo.), 34 Pac. 1059; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, and authorities cited. But a local recording agent has no authority to receive notice of loss: *Edwards v. Ins. Co.*, 75 Pa. 378, nor can he waive proofs of loss required by the policy. This is not within his real or apparent authority. His province is to pass upon the risk, write the policy, collect the premium, etc. But after a loss, there is nothing for the local agent to do. He is not authorized to pay or adjust the loss in any sense, and has nothing to do with that which is required by the assured to be done after the loss in order to effect a recovery or payment of the amount called for by the policy: *Harrison v. Ins. Co.*, 59 Fed. 732; *Von Genceltin v. Ins. Co.*, 75 Iowa, 544, 39 N. W. 881. Perhaps one of the most fruitful sources of litigation and contention in the settlement of losses is where the application for insurance states matters which, if true, and properly authorized, would cause a forfeiture of all rights under the policy. These applications, too, are usually filled by the agents of the companies who solicit risks and work up the business in their locality for their principals. The courts generally hold that where the agent of the company takes the application, fills out the answers to the questions therein propounded to the applicant, and does so by writing incorrect answers or stating facts therein not authorized by the applicant, and procures the signature of the applicant thereto after having written out the answers, he having made correct answers in good faith to all

the interrogatories, and such agent sends the application so filled out to the company which issues a policy thereon, delivers same and receives the premium therefor, the policy will not be invalidated by reason of any falsity of any of the answers contained in the application and made so by the agent taking the same, but the company will be chargeable with the knowledge of its agent received in connection with the preparation of the application, and will be estopped from setting up a forfeiture by reason of any such false statements: *Corbett v. Ins. Co.*, 30 N. Y. 1069; *Providence Life Assurance Soc.*, 58 Ark. 528, 25 S. W. 835; *Continental Ins. Co. v. Pierce*, 39 Kan. 396, 18 Pac. 291; *Dwelling House Ins. Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016; *Purditsky v. Ins. Co.*, 72 Wis. 492, 40 N. W. 386; *McArthur v. Home Life Assn.*, 73 Iowa 336, 35 N. W. 430; *Tennik v. Metropolitan Life Ins. Co.*, 72 Mich. 388, 40 N. W. 469; *Commercial Union Assur. Co. v. Elliott*, 13 Atl. 970; *Union Mut. Life Ins. Co. v. Wilkinson*, 13 Wall. 222; *Sullivan v. Ins. Co.*, 34 Kan. 170, 8 Pac. 112; *State Ins. Co. v. Jordan*, 29 Neb. 514, 45 N. W. 792; *Home Fire Ins. Co. v. Fallon*, (Neb.), 63 N. W. 860; *Kansel v. Ins. Co.*, 31 Minn. 17, 16 N. W. 430; *Driscoll v. Ins. Co.*, 31 W. Va. 851, 8 S. E. 616; *American Life Ins. Co. v. Mahone*, 21 Wall. 152; *N. J. Mutual Life Ins. Co. v. Baker*, 94 U. S. 610; *Woodbury Savings Bank and Bldg. & Loan Assn.*, 31 Conn. 517; *Beebe v. Ins. Co.*, 25 Conn. 51; *Columbia Ins. Co. v. Cooper*, 50 Pa. 331; *Rowley v. Ins. Co.*, 36 N. Y. 550; *Eilenberger v. Ins. Co.*, 89 Pa. 464; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Hingston v. Ins. Co.*, 42 Iowa 46; *Planters' Ins. Co. v. Meyers*, 55 Miss. 479; *Stone v. Haverly Ins. Co.*, 68 Iowa, 737, 28 N. W. 47; *Phoenix Ins. Co. v. Allen*, 109 Ind. 273, 10 N. E. 85; *Bradnap v. Ins. Co.*, 27 Minn. 393, 7 N. W. 735; *Equitable Life Assurance Soc. v. Hazelwood*, 75 Tex. 348, 12 S. W. 621; *Syndicate Ins. Co. v. Catchings*, (Ala.), 16 So. 46; *O'Rourke v. Ins. Co.*, 30 N. Y. 215; *Bernard v. United Life Ins. Assn.*, 33 N. Y. 22; *Mullin v. Ins. Co.*, 58 Vt. 113, 4 Atl. 817; *Germania Ins. Co. v. Hick*, 125 Ill. 361, 17 N. E. 792; *Sprott v. Ins. Assn.*, 53 Ark. 215, 13 S. W. 799; *Eggleston v. Ins.*

65 Iowa, 308, 21 N. W. 652; *Wheaton v. Ins. Co.*, 76 Cal. 415, 18 Pac. 758; *Sawyer Equitable Acc. Ins. Co.*, 42 Fed. 30; *Pacific Mut. Life Ins. Co. v. Snowden*, 58 Fed. 342; *Hingston v. Ins. Co.*, 42 Iowa, 46. And the rule is the same whether the applicant can read and write or not: *Home Fire Ins. Co. v. Fallon*, *supra*. And such filling out of the application is within the scope of the authority of a soliciting agent: *Rowley v. Ins. Co.*, 36 N. Y. 550; *McArthur v. Ins. Co.*, 73 Iowa, 336, 35 N. W. 430; *Prov. Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. 222. Where an insurance company furnishes its agent with blank applications for insurance, the law presumes that such agent has authority from his principal to use them: *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693, 28 N. W. 607.

It has been held in some cases that a soliciting agent, who has only authority to solicit applications for insurance, to forward them to the company for its acceptance, to fix rates of insurance and report on the risk in general, to deliver the policy when issued by the company or its general agents, and to collect and account to them for the premium on the same, but who has not authority to issue and countersign policies or write indorsements thereon, has no actual or implied authority to vary the terms of the policy, to waive any of its provisions, or, by his knowledge or conduct, to estop the company from setting up any forfeiture by reason of a violation of any of the terms of the policy: *Liverpool, London & Globe Ins. Co. v. Shuster*, 63 Miss. 431; *Putnam Tool Co. v. Ins. Co.*, 145 Mass. 265, 13 N. E. 902; *Liverpool, London & Globe Ins. Co. v. Sorsby*, 60 Miss. 202; *American Ins. Co. v. Hampton*, 54 Ark. 75, 14 S. W. 1092; *Armstrong v. State Ins. Co.*, 61 Iowa, 212, 16 N. W. 94; *Crickett v. Ins. Co.*, 53 Iowa, 404, 5 N. W. 543; *Strickland v. Ins. Co.*, 66 Iowa, 466, 23 N. W. 926; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216, 42 N. W. 654; *Smith v. Ins. Co.*, 6 Dak. 433, 43 N. W. 810. And the fact that the company may furnish such agent with printed advertising matter such as calendars, blotters, etc., advertising the agency of such solicitor, will not make him

any other than a soliciting agent, or, in any sense, enlarge the powers conferred upon him: *Putnam Tool Co. v. Ins. Co.*, *supra*; *Armstrong v. Ins. Co.*, *supra*. But by far the better reason and the unquestioned weight of authority is to the effect that the soliciting agent may waive provisions of the policy. The theory of one class of cases is that, as he has no authority to sign a policy or make a contract of insurance, he cannot waive that which he would not be authorized to effect as a valid contract. The reasoning of the other cases is that he is selected by the company, is not selected by the assured, does not act for the assured; all transactions whatever in regard to the insurance are carried on through him; he goes upon the ground at the request of his principal; examines risks; makes rates; prepares diagrams of the property showing the exposures; reports on the physical, moral, and general hazard of the risk; takes the application for insurance; usually fills it up and explains its effect and nature to the uninitiated insured; forwards the application to his principal, whether the latter be a general agent with control of a certain territory or the company itself, who sends the policy to the solicitor for delivery as requested, relying in large part and perhaps entirely, in passing on the risk, upon whether the report of the soliciting agent is favorable or unfavorable. The solicitor collects the premium when delivering the policy, and thus the contract of insurance is consummated, and the assured, usually unacquainted with the technical distinctions and hair-splitting legal differences between a soliciting and a recording agent, has effected his insurance with the solicitor whom he regards as in every sense the agent of the company, and whose acts and doings the company accepts and profits by. The acts and knowledge of such soliciting agent done and received in connection with the negotiations and perfection of the insurance contract, are, in law, the acts and knowledge of the principal who sent the agent out with instructions to get insurance business, and who is stimulated to diligent efforts not only by being urged to this effect, but by the promise and assurance of a liberal commission on all the insurance he can control. So, where an application is

made to the soliciting agent for certain insurance, and he is advised that the applicant intends to obtain additional insurance on the same property, this is, in effect, an application for a policy, which would permit such other insurance, and, if the agent fails to have such a policy issued, the company will not be permitted to take advantage of any want of mention in the policy of the additional insurance: *Brandon v. Ins. Co.*, 27 Minn. 393, 7 N. W. 735; *Wood, Ins.*, Sec. 386. And, though such soliciting agent never notifies his company of the existing or contemplated additional insurance, the rule is the same: *McEuen v. Ins. Co.*, 5 Hill, 101. This, also, although the policy, by its very terms, requires that additional insurance shall be indorsed on the same in writing, or it will be void: *Id.* To same effect, see *Kitchen v. Ins. Co.*, 57 Mich. 135, 23 N. W. 616; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Wilkinson v. Ins. Co.*, 13 Wall. 222. This rule is well expressed in forcible language by the Supreme Court of Illinois in the case of *American Ins. Co. v. Luttrell*, 89 Ill. 314, as follows: "The assured fully disclosed to the agent of the appellant at the time of making the application that he held this insurance policy in the Phoenix Company. He concealed nothing from the appellant or his agent. Appellant, with full knowledge of these facts, accepted the application in the condition in which it was, and issued the policy upon it and accepted the premium which was paid upon it. To hold this policy void under such circumstances would be simply allowing the insurance company to practice an unblushing fraud upon the insured. It was well known to the company when they accepted the premium upon this policy, and issued it as a valid policy to appellee, that there was additional insurance upon the property as it is now. Having thus declared it valid to the assured, the assured having paid his premium upon the faith of that declaration by the company, the company cannot now be permitted to say that it is invalid upon that ground." And the Minnesota court in *Kansal v. Ins. Co.*, 31 Minn. 17, 20, thus states the doctrine: "On principle, as well as for considerations of public policy, agents of insurance companies, authorized to procure applications

for insurance and to forward them to the companies for acceptance, must be deemed the agents of the insurers, and not of the insured, in all that they do in preparing the application or in any representation they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing the applications, a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, but look to the agent as the full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such." To like effect, see *Malleable Iron Works v. Ins. Co.*, 25 Conn. 465; *Hamilton v. Ins. Co.*, 94 Mo. 353, 7 S. W. 261; *Fish v. Cottenet*, 44 N. Y. 538; *Woodbury Savings Bank v. Ins. Co.*, 31 Conn. 517; *Miller v. Ins. Co.*, 31 Iowa, 216; *American Fire Ins. Co. v. Luttrell*, 89 Ill. 314; *Hough v. Ins. Co.*, 29 Conn. 10; *Sexton v. Ins. Co.*, 9 Barb. 191; *Jordan v. Ins. Co.*, 64 Iowa, 216, 19 N. W. 919; *Borchert v. Ins. Co.*, 47 Iowa, 253; *Hardin v. Ins. Co.*, 90 Va. 413, 18 S. E. 911; *Forward v. Ins. Co.*, 142 N. Y. 382, 37 N. E. 615; *Ellis v. Ins. Co.*, 50 N. Y. 402; *Masters v. Ins. Co.*, 11 Barb. 624; *Wilkinson v. Ins. Co.*, 13 Wall. 222; *Fullette v. U. S. Mut. Acc. Assn.*, 110 N. C. 377, 14 S. E. 923; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77; *Bergeron v. Ins. Co.*, 111 N. C. 45, 15 S. E. 883. In the latter case the North Carolina Court thus lays down the rule: "The principle has been more than once announced by this court that, where a soliciting agent is informed before the policy is issued of a fact which, if fraudulently concealed by the applicant would constitute a ground of forfeiture under one of its con-

ditions, and afterwards receives the premium and delivers the policy, his knowledge is imputed to his principal, and whether he actually communicates the fact to the principal office of the company or not, the condition is deemed to have been waived. These rulings rest upon the principle that to permit the insurer to gather into its coffers premiums collected by one of its local agents, and continue to recognize the validity of the contract made through him until it becomes apparent that a loss has occurred, and then, for the first time, to repudiate the agency, would be to lend the sanction of the law to a palpable fraud." It is further held that the acts and knowledge of a clerk done and received while soliciting insurance for his principal, who is a recording agent, is chargeable to the recording agent, and, through him, to the company itself, and it will be bound accordingly: *Bennett v. Ins. Co.*, 70 Iowa, 600, 31 N. W. 948; *McGonigle v. Ins. Co.*, 31 Atl. 868; *Phoenix Ins. Co. v. Ward*, (Tex. Civ. App.), 26 S.W. 763; *Arff v. Ins. Co.*, 125 N. Y. 57, 25 N. E. 1073; *Bergeron v. Ins. Co.*, 111 N. C. 45, 15 S. E. 383; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77. Of course such clerks are practically soliciting agents. If there is any difference, they have not as much authority as a soliciting agent. Again, too, on the same principle the courts hold the acts and knowledge of a medical examiner of a life company, in connection with the proposed risk, to be that of the company, and chargeable to it. And when the assured states facts in good faith to the medical examiner who writes down the answer as he contends it should be written, or fails to write it all, deeming it unnecessary, or makes use of technical expressions which do not convey the correct answer of the assured, or, in short, in any way misleads the applicant to his prejudice in filling up the application or directing the way to answer a question, all such acts are the acts of the company through its medical examiner whom it has appointed for the purpose of taking the application, and, through such examiner, are chargeable to the company and it will be estopped from insisting on a forfeiture by reason of any untrue statement caused by the suggestion of such examiner, or any omission of duty of such examiner to make known to

the company the full purport of the examination and answers, and this though the policy itself makes the answers warranties and their falsity a breach of the contract and forfeiture. *Mutual Benefit Life Ins. Co. v. Robinson*, 58 Fed. 723; *Providence Life Assur. Soc. v. Rendinger*, 58 Ark. 528, 25 S. W. 835; *Purditzky v. Ins. Co.*, 76 Mich. 428, 43 N. W. 373; *McArthur v. Home Life Ins. Co.*, 73 Iowa, 336, 35 N. W. 430; *Equitable Life Assur. Soc. v. Hazlewood*, 73 Tex. 384. 12 S. W. 621. Now it is patent that a medical examiner, like a "solicitor," has no actual or implied authority to make an insurance contract and bind his principal thereby. But he is designated by the company for the purpose of examining the applicant for insurance from a medical and scientific standpoint, and is selected by the company for his supposed fitness for this purpose. The company pays him for his services, and relies on his integrity and ability in his special calling for the necessary information to ascertain whether or not the proposed risk is desirable or not. Such an examiner certainly can have no more, if, indeed, as much, authority to represent his principal as does the soliciting agent of the very same company, perhaps, who is appointed by the company itself or its general agents for the purpose of soliciting risks, taking applications therefor, delivering the policies, and collecting the premium. Both are selected by their principals and not by the applicant for insurance; both are accountable to their companies and not to the assured; both are paid by their employers and not by those from whom they solicit insurance, and, within the legitimate sphere of their action, both bind their principals by their acts and knowledge in connection with the negotiation for the insurance, and, of course, when the company is advised, either directly or through its agents, of facts which would defeat the policy, and, with such knowledge, still issues the policy and takes the premium therefor, it will not be permitted to set up a forfeiture by reason of such defect. Practically all the cases are to this effect, and even if none were, the principle of common sense, natural right, and natural justice would forbid the companies from taking an unconscionable advantage of the assured by their own studied wrong to his great injury,

and would override every contention to the contrary. But it should be borne in mind that the authority of a soliciting agent to bind his company by his acts, declarations, and knowledge, does not exist after the policy is delivered and the premium collected. After that, the solicitor's agency is at an end and no notice to him will effect or bind the company in any way: *Hamilton v. Ins. Co.*, 15 Mo. App. 59; *Snedicor v. Ins. Co.* (Mich.), 64 N. W. 35. And the same doctrine applies to brokers who are simply employed to deliver the policy, collect the premium, etc.: *Mellon v. Ins. Co.*, 17 N. Y. 609. But it is the duty of such solicitors and brokers to reveal to their principals all information they may obtain affecting the risk in connection with any or all of the duties they perform in taking the application, delivering the policy, and collecting the premium, and the applicant has a right to rely on the assurance the law justifies that these agents will so discharge their duty to their principals: *Whitney v. National Masonic Acc. Assn.* (Minn.), 57 N. W. 943; *Hamilton v. Ins. Co.*, 15 Mo. App. 59. And a provision in the policy making the agent soliciting the insurance the agent of the applicant will have no force: *Meyers v. Ins. Co.*, 156 Pa. 420, 27 Atl. 39; *Kahn v. Ins. Co.*, (Wyo.), 34 Pac. 1059. The authority of the agent is not limited by the written or oral appointment by the principal, but is co-extensive with the apparent authority which induces, in the ordinary transactions of business, a belief that the agent possesses that authority which would prompt a reasonable person to believe that it existed to the full extent warranted from the holding out of the agent to the world by the company: *Farmers & Merchants Ins. Co. v. Chestnut*, 50 Ill. 111; *Kedler v. Ins. Co.*, 16 Wis. 523; *Kenton v. Ins. Co.*, 6 Bush., (Ky.), 174; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. 222; *Hartford Fire Ins. Co. v. Farrish*, 73 Ill. 166. And, as a general rule, where the assured has no knowledge of any limitations on the authority of the agent with whom he deals, the extent of the authority of such agent is a question of fact for the jury: *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Hardwick v. Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Phoenix Ins. Co. v. Stocks*, (Ill. App.), 36 N. E. 408. But an agent has no implied or

actual authority in law to issue a policy to himself. This rule is based on the principal that the law will not permit one to serve diverse interests: *Wuldburger v. Ins. Co.*, (Miss.), 17 So. 282; *Hanover Fire Ins. Co. v. Shrader*, (Tex. Civ. App.), 31 S. W. 1100. The authority of a recording agent, where disputed, may be shown by advertising circulars, issued by the company for which he acts, stating that such agent has authority to issue policies, where such circulars are brought to the knowledge of the person dealing with the agent in such capacity: *Frank v. Ins. Co.*, 62 N. W. 454.

There is still another class of agents who figure more or less extensively in soliciting insurance and procuring policies. Reference is had to so-called brokers. The extent of the authority of these agents is usually not very difficult of ascertainment, but, to arrive at a correct determination of the nature and scope of their authority, it is always necessary to ascertain for whom they act, whether for the assured or for the company or, possibly, for both. Ordinarily, like a soliciting agent, the broker only binds his company in what he does in delivering the policy and collecting the premium. Within the scope of this authority he may bind his principle by a neglect to collect the premium as directed. So, where a policy is sent to a broker who is instructed to collect and remit the premium, and he delivers the policy, collects the premium, but fails to pay it to the company, the latter will be liable, nevertheless, for a loss, though the policy provides that it shall not be binding until the actual payment of the premium to the assurer: *Universal Fire Ins. Co v. Black*, 109 Pa. 535, 1 Atl. 523; *Criswell v. Riley*, 5 Ind. App. 496, 32 N. E. 814. And so, the knowledge of a broker who is employed by an agent of a company to procure business, for it is such knowledge of the company as will estop it from asserting a forfeiture of the policy which, though unknown to the company, is known and ascertained by the broker through his negotiations for the insurance: *Mullin v. Ins. Co.*, 58 Vt. 113, 4 Atl. 817. The acts and knowledge of such a broker are the acts and knowledge of the company to the same extent that they would be if the insurance had been negotiated through

the agent instead of the broker: *Riley v. Ins. Co.*, 110 Pa. 144, 1 Atl. 528. Of course, if the broker be employed by the applicant to get the insurance for him, he will be the agent of the applicant in all his acts in this direction: *White v. Ins. Co.*, 120 Mass. 330. If, too, the company entrust the broker with the policy to be delivered by him to the applicant upon the payment of the premium, the broker, to this extent, only, will represent the company. The status of the relation of the broker to the company, or to the applicant, will, when disputed, be usually a question of fact for a jury, and when solved in this respect, the legal effect of the relation will not be difficult. The applicant is bound as to everything the broker does as his agent. On the other hand, it follows necessarily that in all the broker does in behalf of the company, he is its agent, and it will be bound by his acts within the scope of such agency.

In cases of losses insurance companies have agents for the purpose of looking after and settling these. Agents for this purpose are denominated adjusters. Their duties relate solely to matters connected with the insurance contract after the loss occurs. Consequently, no act or declaration of an adjuster in regard to anything that might transpire before the loss could bind his company, because it is not within the real or apparent scope of the authority of such an agent to do any act in reference to the effecting of the insurance. But within the scope of his authority, the adjuster, like any other agent, may bind his principal by his acts and knowledge. And if a company sends its adjuster to settle a loss under a policy, and the adjuster, after looking into the case, notifies the assured that the company will not pay the loss, this will have the effect of putting the assured and insurer at arms' length, and the former may then sue without furnishing proofs of loss, or complying with other like conditions precedent, which will have been waived by the act of the adjusting agent, and, through him, by the company itself: *Parsons v. Ins. Co.*, (Mo.), 31 S. W. 117; *Kahn v. Ins. Co.*, (Wyo.), 34 Pac. 1059; *East Tex. Fire Ins. Co. v. Brown*, 82 Tex. 635, 18 S. W. 713; *Home Fire Ins. Co. v. Hammang*, (Neb.), 62 N. W. 883. And such denial of

liability by the adjuster will deprive the company of the benefit of a stipulation in the policy that it may have ninety days within which to pay the loss after the receipt of notice and satisfactory proofs of same, and suit may be begun on the policy at once: *German Ins. Co. v. Gibson*, 53 Ark. 495, 14 S. W. 672. The sending of an adjuster to settle a loss of itself vests him with the authority to agree on the amount due the assured by reason of the loss: *Id. Brown v. State Ins. Co.*, 74 Iowa, 428, 38 N. W. 135. But where the assured relies on a waiver by an adjuster, the onus is on him to show the authority of such agent: *German Ins. Co. v. Davis*, (Neb.), 59 N. W. 698. But where an adjuster has, with proper authority, once adjusted a loss in which the insured was interested, the latter is justified in relying on the authority of such adjuster to settle another loss for the same company, no revocation of authority having been brought home to the assured: *Slater v. Ins. Co.* 57 N. W. 422. It has been held that an adjuster who is selected by his principal for his special fitness in the line of duty assigned him, cannot appoint another to act in his stead without the consent of the company, and this is doubtless sound law: *Ruthven v. Ins. Co.*, (Iowa), 60 N. W. 663. But see, *contra*, *Swain v. Agricultural Ins. Co.*, 37 Minn. 390, 34 N. W. 738. In this last case, too, the adjuster had general authority as such, and it was held that he had authority to appoint others to assist him in his duties and work as such.

There is yet another class of agents with more extended powers than any that have been considered. These are classed as general agents. Some of the courts hold that local recording agents with authority to pass upon risks and issue policies and collect the premium therefor, are general agents, and bind the company by their acts: *Kahn v. Ins. Co.*, (Wyo.), 34 Pac. 1059. But these are not the general agents now under discussion, but rather such as have charge over a state or other territory and exercise a general superintending control over inferior agencies and the business of their principals generally within the bounds of the territory to which they are assigned for duty. Generally, it is not difficult to arrive at a correct conclusion as to the scope and extent of powers of such

agents. As the term imports, they have general authority, and, possessing such, and having charge in this capacity over large territory and extensive operations, they are not limited in authority as a soliciting, recording, or other agent is, but have full power and authority to bind their companies by waivers of the terms of the policy and forfeitures in general, and their acts and doings are practically tantamount to that of the company itself: *Wood v. Ins. Co.*, 32 N. Y. 619; *Haruthal v. Ins. Co.*, 88 N. C. 71; *Mutual Life Ins. Co. v. Nichols*, (Tex. Civ. App.), 26 S. W. 998. Of course, it makes no difference if the policy stipulates that no agent can waive its terms and conditions: *Phoenix Ins. Co. v. Bowditch*, 67 Miss. 631, 7 So. 596; *Wick v. Ins. Co.*, 2 Colo. App. 484, 31 Pac. 389; *State Ins. Co. v. Taylor*, 14 Colo. 499, 24 Pac. 332; *Boetcher v. Ins. Co.*, 47 Iowa, 253; *Phoenix Ins. Co. v. Munger*, (Kan.), 30 Pa. 120; *Carpenter v. Ins. Co.*, 135 N. Y. 298, 31 N. E. 1015; *Bergeron v. Ins. Co.*, 111 N. C. 45, 15 S. E. 883; *May, Ins., Sec.* 131, 132; *Bennett v. Ins. Co.*, 70 Iowa, 600, 31 N. W. 948; *Follette v. Assn.*, 107 N. C. 240, 12 S. E. 370.

The law requires the utmost good faith on the part of both the assured and insurer. Neither will be permitted to perpetrate a wrong or injury on the other or take any unfair advantage. As has been seen, the difficulty usually arises in cases where the authority of an agent is denied on the one hand and maintained on the other. Under the various grades of agency, as we have seen, many difficult questions often confront both the insured and insurer. The effort has been many to render these questions as lucid as possible within the space consumed.

W. C. RODGERS.

Nashville, Ark., September, 1895.

DEPARTMENT OF CORPORATIONS.

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GRAVELY v. SOUTHERN ICE MACHINE CO.¹ SUPREME COURT
OF LOUISIANA. FEBRUARY 11, 1895.

Foreign Corporation—Service of Process.

Any service which would be sufficient as against a domestic corporation may be authorized by the statute of a state to commence an action against a foreign or non-resident corporation. It may, accordingly, be made upon the president of a foreign corporation during the time he may be temporarily abiding within the jurisdiction of the court where the suit is brought.

A judgment to be rendered in an action thus commenced against a foreign corporation will be valid, and can be enforced against any property at any time found within the state.—(Syllabus by the court.)

SERVICE OF PROCESS UPON A FOREIGN CORPORATION.

It is not surprising that in dealing with "an artificial being, invisible, intangible, and existing only in contemplation of law," questions and problems more or less troublesome should arise. It is true enough when it is sought to determine the status of a corporation and its powers within the jurisdiction which created it, but when territorial lines are passed, and the rights and liabilities of a corporation in a foreign jurisdiction become involved, the "invisible, intangible" character of the "artificial being" becomes more pronounced and the questions arising become correspondingly more difficult of solution. And this seems but natural when we are told that a "corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created" (*Paul v. Va.*, 8 Wall. 181); but that statement is subject to qualifications to be noted later on.

¹ Reported in 47 La. Ann.

Among the questions which do arise in such cases is that of the liability of a corporation to suit in a foreign jurisdiction, and this question involves the primary one: How may process be served upon such foreign corporation? It was stated by Judge STORRS, in *Middlebrooke v. Springfield Fire Insurance Co.*, 14 Conn. 301, that "by the common law there is no process which can be served either upon natural persons not inhabitants of or within the realm, or upon foreign corporations, by which their appearance can be compelled in any court, for the reason that the former are not found within the realm and the latter has no corporate existence within it, nor could either be compelled to appear by an attachment of their property: *Com. Dig.* (attachment), 1 Tidd Pr. 116; 16 Johns. Rep. 5; 16 Pick. 274. If, therefore, they can be brought into court, it must be by virtue of some statutory provisions." (See, also, *Barnett v. R. R.*, 4 Hun, 114; *Newell v. Ry.*, 19 Mich. 336; *Latimer v. Ry.*, 43 Mo. 109.)

In *Pennoyer v. Neff*, 95 U. S. 714, it was held that to entitle a personal judgment rendered in a state court against a non-resident, to be received in evidence in the Federal courts, personal service of citation on the party or his voluntary appearance is essential to the jurisdiction of the court, except, possibly, in a proceeding to determine the status of a citizen towards a non-resident, or where a party agrees that service upon another shall be equivalent to service upon himself. According to Mr. Justice FIELD, "the doctrine of that case applies in all its force to personal judgments of state courts against foreign corporations;" the courts rendering them must have acquired jurisdiction over the party by personal service or voluntary appearance, whether the party be a corporation or a natural person. There is only this difference: a corporation being an artificial being, can act only through agents and only through them can be reached, and process must therefore be served upon them. In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers

appointed by them to manage its business. But the moment the boundary of the state is passed, difficulties arise; it is not so easy to determine who represent the corporation there, and under what circumstances service on them will bind it:" *St. Clair v. Cox*, 106 U. S. 353.

Let us see what some of those difficulties are, and how they have been met by the courts.

As pointed out by Justice FIELD (*supra*), the difference between service of process upon a corporation and upon a natural person is that the former, "being an artificial being, can act only through agents and only through them can be reached;" but the authority of an agent is not unlimited, and one who is an agent under certain conditions and for certain purposes is not necessarily an agent under others; hence, while a natural person going into a particular place or jurisdiction, cannot deny his own personal existence there (*Smith v. Tuttle*, 5 Biss. 159, *contra*), nevertheless he may, in certain cases, dispute having brought with him the personalities of other beings, which he may have represented and been officially identified with in other localities: See the case of *Bushell v. Ins. Co.* (15 S. & R. 173, 1827). In that case, it was said that the president of a bank of one state upon going into another state on business unconnected with the corporation would not represent the corporation there; but the question was left undetermined, where a corporation locates an officer within a state for the express purpose of making contracts there, whether service of process upon him would be sufficient.

This question has, however, arisen and been settled affirmatively in a number of cases decided since that time, and is one which has been the subject of statutory provisions in nearly every state.

In *Lafayette Ins. Co. v. French* (18 Howard, 404), the Supreme Court of the United States held that a judgment recovered in Ohio against an Indiana insurance company, service having been made upon a resident agent of the company in Ohio, and the laws of that state providing that such service should be "as effectual as though the same were

served on the principal," is a judgment entitled to the same faith and credit in Indiana as in Ohio.

Mr. Justice CURTIS, in delivering the opinion of the court, said: "This corporation, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that state: *Bank of Augusta v. Earle*, 13 Pet. 519. But it does not necessarily follow that a valid judgment could be recovered against it only in that state. The inquiry is not whether the defendant was personally within the state, but whether he or some one authorized to act for him in reference to the suit, had notice and appeared; or if he did not appear whether he was bound to appear or suffer a judgment by default. A corporation created by Indiana can transact business in Ohio only with the consent express or implied of the latter state: 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and those conditions must be deemed valid and effectual by other states and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence. In this instance, one of the conditions imposed by Ohio was in effect that the agent who should reside in Ohio and enter into contracts of insurance there in behalf of the foreign corporation, should also be deemed its agent to receive service of process in suits founded on such contracts. We find nothing in this provision, either unreasonable in itself or in conflict with any principle of public law."

The decision, in this case, however, was expressly limited to the case of a corporation acting in a state foreign to its creation, under a law of that state which recognized its existence for the purpose of making contracts there and being sued on them through notice to its contracting agents.

In *St. Clair v. Cox* (106 U. S. 350), the court in passing upon a Michigan statute, providing in suits commenced by attachment against a foreign corporation, that service may be

made upon "any officer, member, clerk or agent of such corporation within this state," said: we do not, however, understand the laws as authorizing the service of a copy of the writ as a summons upon the agent of a foreign corporation, unless the corporation be engaged in business in the state and the agent be appointed to act there. We so construe the words "agent of such corporation within the state." They do not sanction service upon the officer or agent of the corporation who resides in another state, and is only casually in the state, and not charged with any business of the corporation there." In concluding the opinion, the court used this language: "Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute—a member for instance of the foreign corporation, that is a mere stock stockholder—is not a departure from the principle of natural justice mentioned in *Lafayette Ins. Co. v. French*, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that when service is made within the state upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record either in the application for the writ or accompanying its service, or in the pleadings or in the findings of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special appearing, a certificate of service by the proper officer on a person who is its agent there, would in our opinion be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open when the record is offered in evidence in another state to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose."

The doctrine of these cases has been recognized and applied in later decisions of the same court, the most recent of which is *Goldrey v. Morning News* (156 U. S. 518-1895); in that

case it was held that in a personal action against a corporation, neither incorporated nor engaged in business in the state, nor having an agency or property therein, service upon its president temporarily within the jurisdiction is not sufficient service upon the corporation. In considering the principles underlying the question, Mr. Justice GRAY says: "It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction, or upon some one authorized to accept service in his behalf, or by his waiver by general appearance or otherwise of the want of due service. A judgment rendered in a court of one state against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation; and not merely upon an officer or agent residing in another state and only casually within the state and not charged with any business of the corporation there." *Lafayette Ins. Co. v. French*, 18 How. 404; *St. Clair v. Cox*, 106 U.S. 350; *Fitzgerald Co. v. Fitzgerald*, 137 Id. 98; *Mexican Central Ry. v. Pinkney*, 149 Id. 94; *In re Hohorst*, 150 Id. 653. The doctrine of the Supreme Court therefore seems to be that in order to sustain service upon an agent of a foreign corporation, it must appear that at the time and place of service he was an agent in fact, charged with the business of the corporation there. In two of the states statutes have been so construed as to sanction service upon an agent of a foreign corporation, even though at the time he be merely upon a pleasure trip, or engaged solely upon his own private business and not upon any business of the corporation.

In passing upon a Michigan statute, the Supreme Court of that state said: "We cannot hold under the statute above referred to that the officer or agent of the corporation within the state must be here upon official business for his corporation or specially authorized by it to receive service. To do this would be to allow the individual upon whom the service

is made to determine in most cases for himself without fear of successful contradiction whether at the particular moment of such service he was acting as such officer or agent or as a private person. It would have a tendency to thwart the special purpose and object of the statute, and such we do not think was the intent of the legislature. The officer or agent must be presumed and held as such for the purposes of service under the statute, and cannot throw off his representative capacity at will in order to defeat its manifest object : " (*Iron Co. v. Construction Co.*, 61 Mich. 226.) It may be noted that a statute of the same state was before the court in *St. Clair v. Cox*, *supra*, and see *U. S. Graphite Co. v. Pacific Graphite Co.*, 68 Fed. 442.

In *Pope v. Terre Haute Co.* (87 N. Y. 137), it was held that where service was made upon the president of a foreign corporation while he was temporarily within the state for purposes of his own on his way to a seaside resort, the same was valid notwithstanding the corporation transacted no business nor had any place of business or property within the state. The court justified the decision by holding that "the object of all service of process for the commencement of a suit or any other legal proceeding, is to give notice to the party proceeded against, and any service which reasonably accomplishes that end answers the requirements of natural justice and fundamental law (*Gibbs v. Queen Ins. Co.*, 63 N. Y. 114), and what service shall be deemed sufficient for that purpose is to be determined by the legislative power of the country in which the proceeding is instituted, subject only to the limitation that the service must be such as may reasonably be expected to give the notice aimed at." (See, also, *Hiller v. R. R.*, 70 N. Y. 223.)

If this be sound doctrine there would seem to be no reason why a legislature should not provide that service could be made in such cases by registered letter directed to an officer either within or without a state; such a mode might "reasonably be expected to give the notice aimed at." But, however much such a law may be recognized and enforced in the state where it originates, it is unlikely to be approved in other juris-

dictions and tribunals, for it certainly seems to be "inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural law which forbids condemnation without opportunity for defence."

In *Moulin v. Ins. Co.*, 4 Zab. (N. J.) 222, the court, in speaking of the law referred to, said: "But I am quite prepared to say that when a corporation confines its business operations to the state which chartered it, a law of another state which sanctions the service of process upon one of its officers or members accidentally within its jurisdiction, is unreasonable and so contrary to natural justice and to the principles of international law, that the courts of other states ought not to sanction it. In such a case a president or other officer ought not to be considered as carrying his official character along with him." In that case it was held that a judgment obtained in New York in such a manner was not binding in New Jersey.

The attitude of the Supreme Court of Pennsylvania upon the question is expressed thus by Chief Justice PAXSON in *Phillips v. Library Co.* (141 Pa. 462): "We do not understand that the act of 1849 or any of the cases cited countenance the doctrine that if the president of a New Jersey corporation which transacted no business in this state, crosses the Delaware river to dine with a friend on this side, he thereby carries the corporation with him and subjects it to the jurisdiction of the courts of this state as to contracts made or torts committed in New Jersey. Under such circumstances he is not here in his representative capacity. He is not the corporation nor does he bring it here. If the rule were otherwise he would carry the corporation with him upon a trip around the world, and subject it to the jurisdiction of every country he might visit. We will not designate such a proposition as absurd, but it certainly has not a shadow of reason to sustain it."

To these forcible judicial utterances may be added a quotation from the most recent text book authority upon the subject (Alderson on Judicial Writs and Process), which gives

special consideration to the subject, and concludes in part as follows: "It may now be correctly asserted that the presence of a corporation is in the state where it was created and in any other state where it transacts business. This proposition produces the corollary that a corporation cannot be considered present in a state where it was neither incorporated nor does business" (p. 219).

That this is well settled law, the following additional cases may be referred to as authority: *Camden Rolling Mill Co. v. Iron Co.*, 32 N. J. L. 15; *R. R. v. McDermid*, 91 Ill. 170; *R. R. v. Hook*, 40 Ill. App. 547; *Silsbee v. Hotel Co.*, 30 Id. 204; *Latimer v. Rwy.*, 43 Mo. 105; *Peckham v. Haverhill Parish*, 16 Pick. 274; *State v. Dist. Ct.*, 26 Minn. 233; *Lathrop v. Rwy.*, 1 McArthur 234; *Dallas v. Rwy.*, 2 Id. 146; *Schmidlapp v. La Confiance Ins. Co.*, 71 Ga. 246; *Newell v. Rwy.*, 19 Mich. 336; *Bushel v. Comth. Ins. Co.*, 15 S. & R. 173; *Goldcy v. Morning News*, 42 Fed. 112; *Reifsnider v. Pub. Co.*, 45 Id. 433; *Fidelity Vault Co. v. Rwy.*, 53 Id. 800; *American Wooden-ware Co. v. Stem*, 63 Id. 676; *St. Clair v. Cox*, 106 U. S. 350; *Fitzgerald Co. v. Fitzgerald*, 137 Id. 98; *Goldcy v. Morning News*, 156 Id. 518; see also *Morawets on Private Corporations*, Sec. 980, Vol. 25, Am. & Eng. Ency. of Law, 132.

It being therefore established that in order to sustain a personal judgment rendered in the court of a state against a foreign corporation, it must appear that the corporation was engaged in business in the state, the next question is to determine what constitutes being "engaged in business in the state?" Having an established agency at which the usual business of the corporation is conducted certainly fulfils the condition; but is it necessary that the business be localized, and more or less permanent and regular in character, or will a single transaction or acts incidental thereto, answer the requirement of the law?

This question, though not a new one, is suggested by the recent decision rendered by the Supreme Court of Louisiana in the case of *Gravelly v. Southern Ice Machine Co.*, (16 Southern Rep. 866), which has been selected as the subject of this

annotation. The facts of the case as well as the ruling of the court are contained in the following extract from the able opinion delivered by Mr. Justice WATKINS: "The defendant, a foreign corporation, dwelling in the State of Tennessee, sent its recognized agent into the State of Louisiana, endowed with special authority to employ the plaintiff to negotiate with McDonald and Hart, of the city of New Orleans, for sale to them of an ice manufacturing plant; that the plaintiff was thus employed and through his agency a sale of a plant was negotiated with said parties at the price of \$110,000, and same was by the defendant after established in said city. Disagreements between these contracting parties arose, a suit followed in the court of this city and state, which is still pending. While within the state of Louisiana, and in this city superintending this work, the president of the corporation was personally cited and served with process in this case, asking enforcement of plaintiff's demand for compensation for commissions under his contract with the company. In this situation, we are of opinion that the District Court thereby acquired full and complete jurisdiction over the defendant corporation *pro hac vice*. The principle to be kept in mind, and on which the jurisdiction of the Federal court is predicated, is the citizenship of the defending corporation; and, unless the character of the business of the corporation conducted in a foreign state be such as to constitute it a citizen of the latter state *pro hac vice*, the Federal jurisdiction is not complete. But in a state court the rule is different; the only question there being one of proper and effective service of process upon an officer legally representing the corporation, whereby it can be brought into court, and subjected to judgment, or of proper notice upon an officer of the corporation to bring the matter in litigation to its attention, and require its action. The rule in such a case is identically the same as that in reference to any domestic corporation; the effect of the judgment to be rendered being confined to its property within the jurisdiction of the courts of the state. Our conclusion is that the service of citation on the president of the defendant corporation, while temporarily abiding here, is a good and effective service, on which a valid

judgment may be founded, which may be enforced against any property of the defendant company *within the state*."

In the course of the opinion the court says: "Under our law a corporation is an intellectual being, who may be sued in our courts as natural persons are," and it is said that a foreign corporation is to be treated as a "foreigner" under the Louisiana Code of Practice, that is to say, "one who has no known place of residence in the state and consequently may be cited wherever it is found," (citing *State v. Fruit Co.*, 46 La. Ann. 656). The New York case of *Pope v. Manufacturing Co.* (*supra*), which decided that a foreign corporation could be cited by serving its officer, while temporarily within the state, not in any official capacity or on the business of the corporation, is cited and quoted with approval; but the court is careful to say, as was said in the latter case, that "a judgment to be rendered in an action thus commenced against a foreign corporation, will be valid for every purpose within the state, and can be enforced against any property at any time *found within this state*. Its effect elsewhere need not now be determined."

But considering the decision with due regard to the facts before the court, the case decides that "proper and effective service of process upon an officer legally representing the corporation," is all that is necessary in such cases, and that such was secured when service was duly effected upon the president of the foreign corporation, temporarily within the jurisdiction, but, "charged with the business of the corporation" there, to wit, supervising the erection of the ice plant, contracted to be established by the defendant, as well as attending to the corporation's interests, as plaintiff, in the suit then and there pending, and which related to such contract. The decision, therefore, is not open to the criticism that it is in conflict with the line of cases, to which *Goldley v. Morning News* (*supra*) is the most recent addition, for the facts clearly show that the officer served was at the time "charged with the business of the corporation" to a certain extent; but, as above suggested, the case seems to invite the inquiry whether the corporation was *engaged in business in the state*,

the requisite mentioned in some of the decisions already referred to.

In addition to the Pope case, the court cites *Hagerman v. Empire Slate Co.* (97 Pa. 534), in which it was held that, though a foreign corporation had failed to establish an office and designate its agent as required by statute, service could, nevertheless, be made upon an agent within the state charged with the company's business there. The facts of the case show that while the agent had not been formally appointed by any regular resolution of the board of directors, he was, however, requested by the president to attend to the affairs of the corporation in Pennsylvania; the defendant was a slate company owning slate quarries in that state, which were leased upon a royalty payable in slate; the agent lived in the neighborhood of the quarries, and had charge of the sale and shipment of slate for the company, the rental of certain parts of the real estate and the payment of taxes; he gave receipts in the company's name as agent and accounted to the company for receipts and disbursements in its behalf. In the language of the court, "thus it appears, in fact, that he acted as an agent of the company. Under all the facts proved we think he was shown to be such an agent as to make the service on him valid." (For a similar ruling, see *Foster v. Lumber Co.*, 58 N. W. 9.)

It has been held that the Act of 1849 (Pa.) regulating service in such cases, contemplates only a foreign corporation doing business within the Commonwealth: *Phillips v. Library Co.* (*supra*); and in *McConkey v. Peach Bottom Slate Co.* (14 C. C. Rep. 514), it was doubted whether a single transaction was sufficient; but in *Klopp v. Water Wks. Co.*, 52 N. W. (Neb.), 819, the court seemed to be free from doubt upon the question, as appears from the following language of Chief Justice MAXWELL: "Where a foreign corporation contracts a debt in this state, as for labor and materials, service in this state upon the managing agent is sufficient, though he be but temporarily within the state. Now suppose a foreign corporation comes into this state and purchases goods to be paid for here, must the seller go into another state or, perhaps, a foreign

country to recover for the same? That is true if service cannot be had upon the corporation in the state. Then the seller must bring his action where service can be had. But a person who has authority to contract a debt within this state for a corporation, is so far the managing agent within the state that service may be had upon him for that debt that will bind the corporation. The agent is commissioned to contract the debt and the corporation thereby secures the benefit of his services. It must also take the burden of being liable to an action therefor." In *Galveston City R. R. v. Hook* (40 Ill. App. 547), it was held that where the president of a foreign corporation is temporarily in the state upon his own business, there being no agent or place of business within the state, a merely casual offer by him to receive a proposition relating to the business of his company, is not the transaction of business by an agent, as authorizes the conclusion that the company is transacting its business in the state; the court says: "To be found within the state, a foreign corporation must have sent its agent on whom service is made, to the state to conduct its business therein either continuously or for a time, so as to complete a transaction or an enterprise, or, at least, charged with the duty of making a particular contract in the state or negotiating therein for the company."

It may be found of interest to advert at this point to a line of federal decisions bearing upon this question. It will be recalled that in the opinion of the court in the principal case, a distinction was pointed out with regard to the jurisdiction of the federal and state courts; that the former depended upon the "citizenship of the defending corporation." This, however, was not formerly the law, for by the acts of 1789, 1858 and March 3, 1875 (18 Stat. 470), relating to the jurisdiction of the circuit courts, it was provided that no civil suit should be brought "against any person in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, &c.," the act of August 13, 1888 (25 Stat. 433), has repealed the permission to sue a defendant in a district in which he is *found*, and has peremptorily enacted that "where

the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the *residence of either the plaintiff or defendant*:" See *McCormick v. Walther*, 134 U. S. 41; *Shaw v. Quincy Mining Co.*, 145 Id. 444. In the latter case it was held that a foreign corporation engaged in business in one state, was not a *resident* thereof; hence could not be sued there in a federal court by a citizen of a different state. But before the act of 1888 it could have been so sued, the question then being, was it *found* within the district (?) as was the question in the principal case. Let us examine a few of the cases decided under the old law.

In *Hume v. R. R.*, 8 Biss. 31 (1877), it was held that the presence of the agent of a foreign corporation engaged in business in the state, was not the presence of the corporation itself, within the meaning of the act, "any more than the presence of the agent of a natural person, a citizen of another state is the presence of the principal;" a similar decision had been made in *Pomeroy v. R. R.* (4 Blatch. 120), 1857; and in *Maine v. Bank*, 6 Biss. 26 (1874); but these decisions are certainly not consonant with later authority. See *Wilson Packing Co. v. Hunter*, reported in same volume, 8 Biss. 429, 1879.

In *Good Hope Co. v. Barb Fencing Co.* (22 Fed. 635, 1884), the question raised was, in the language of the court, "whether jurisdiction is acquired in an action brought against a foreign corporation by the service of process on its president while in this district, although the corporation has no office or place of business within this state, and is not engaged in business here, except that occasionally it has made a purchase of goods by sending its agent here for that purpose. Its president came here to adjust a controversy between it and the plaintiff growing out of such a purchase and was then served with the summons in this action. Stated in another form the question is whether a foreign corporation is "found" here within the meaning of Section 739, Rev. St., for the service of process, when its president is temporarily here upon the business of the corporation. After criticising the doctrine of the high

court of the same state (*Pope v. Mfg. Co.*), and quoting Justice FIELD in *St. Clair v. Cox*, the court concludes as follows: "A corporation ought not to be deemed 'found' within the meaning of Section 739, unless it is so far constructively present at the place where its agent is served with process, that a judgment against it would be respected everywhere and be given full force and efficacy in other jurisdictions. Where a corporation is not engaged in business in this state there is no room for implying its consent to come here to litigate with a citizen of this state or a foreign state. In this case the president of the defendant corporation was here in his representative character, but the corporation had never been *practically engaged in business here*. It had made purchases here occasionally, but it could have made them by correspondence as well as by the presence of its agents here. If the purchases had been made by correspondence it could be as logically urged that the corporation was engaged in business here as it can be now. Instead of writing its agent came here in person; as it has never kept an office here or been engaged in any business here which required it to invoke the comity of the laws of the state, it was not 'found' here for the purpose of being sued. The motion to vacate the service of the process is granted" (per WALLACE, J.).

Thus a Federal court of New York refused to follow the ruling of the highest court of the state. In the same court it was held that in a suit against an Illinois corporation for infringement of a trade mark, service upon the agent in the transaction out of which the suit arose, *at its place of business within the district*, was sufficient—*Estes v. Belford* (Id. 275). In *U. S. v. Am. Bell Telephone Co.* (29 Fed. 17), it was held: "When a foreign corporation carries its corporate business, or some substantial part thereof, in this state by means of an agent or representative appointed to act here, and having the charge and management of such business, it impliedly assents to be found and sued here in the person of such agent;" but it was there held that the case did not come within the operation of the rule. In *Carpenter v. Westinghouse Air Brake Co.* (32 Fed. 434), which was a suit for an infringement of a

patent, it appeared that the defendant corporation (of Pa.) had within the state of Iowa a train of cars, to which was attached the brake which it manufactured and sold, which train of cars and brake were exhibited and used simply for the purpose of exhibition; no contracts for the sale of the brake were there made. The question propounded by the court was: "Does the fact that the chief officers of the corporation come into the state with some of its property for advertisement and exhibition, bring that corporation into the state as an inhabitant or so that it can be said to be *found* within the state within the act of Congress?" The court held that it did not, saying: "If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere, that should send its circulars into the state, send newspapers with its advertisement, would be engaged in business in that state, and to be found there for the purposes of suit. The true rule is that the corporation does not come into the state, is not found in any state, unless in some way it establishes an office or agency for the transaction of the business for which it is organized, and when that is done it has no right to say it is not found within the state" (per BREWER, J.).

In *St. Louis Wire Mill Co. v. Consolidated Barb Wire Co.*, reported in the same volume, page 802, it appeared that a Kansas corporation had made occasional purchases of raw material in St. Louis by mail and by agents, though it never had a business office or agent located in Missouri; a controversy arose with reference to one of these purchases made by one of its officers, and during a visit by him to the city to attend the St. Louis Fair, he was called upon at his hotel by a representative of the plaintiff with a view to an adjustment of the matter; a discussion of that and other business matters took place at some length, but nothing was accomplished thereby; subsequently he was served with process as being the agent of the defendant. It was held that the service was not sufficient. After a discussion of the authorities upon the question what constitutes being "engaged in business in the state," Judge THAYER says: "When it is said that a corpora-

tion is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of processes on foreign corporations, reference is plainly had to business operations of the corporation carried on within the state through the medium of agents appointed for that purpose, *that are continuous, or at least of some duration*, and not to business transactions that are merely casual, such as an occasional purchase of goods or material within a foreign state."

The doctrine of the Good Hope case has been applied in later decisions by the same court; in *Clarus v. Woodstock Iron Co.*, 44 Fed. 31 (1890), it was applied where service had been made in New York upon the president of an Alabama corporation (Mining Co.), while he was in that city attending to the business of various enterprises, including the negotiation of a mortgage on defendant's property, and having the bonds secured thereby listed on the Stock Exchange; it appeared that the corporation had done no other business in the state. The court considered that such business could have been conducted by correspondence as well. "It kept no office here; it did not continuously or even for a period of some duration, carry on here the business which it was organized to carry on, and by the regular transaction of which it gave evidence of its continued existence. It cannot, therefore, be held under the authorities that the defendant was at the time when Tyler was served, engaged in business in this state so as to make service of the summons on him efficient to bind the corporation:" See, also, *Goldrey v. Morning News*, 42 Fed. 112; *Hunter v. Improvement Co.*, 26 Id. 299; *Bentlif v. London & Colonial Finance Corp.*, 44 Id. 667; and *American Wooden Ware Co. v. Stem*, 63 Id. 676.

In the last mentioned case the officer was present in charge of one of the company's suits, and it appeared that prior to the service the defendant had bought in at execution sale a stock of goods of its judgment debtor, and sold the same in the regular course of business through a special agent in New York; also that it had received orders there through a travelling salesman, but that it never had an agency or transacted

business in the state except as stated. Motion to vacate service of process was granted.

In the recent case of *U. S. Graphite Co. v. Pacific Graphite Co.* (68 Fed. 442, 1895), the Circuit Court of Michigan, in applying the doctrine of the *Goldney Case* and the *Good Hope Case* to the facts before the court, said: "James O. Roundtree, the president of the defendant company in this cause, was not the resident agent of the corporation, for it had none such in Michigan; and if it be conceded that, while temporarily here, at the time of the service made upon him, he was engaged in negotiations concerning the business of the company, this is not sufficient to subject the defendant to the jurisdiction of any court in this state by reason of service made upon him."

This decision marks a second departure by a federal court of a state from the ruling of the highest state court upon the question.

These cases, it is thought, will serve to indicate the extent to which some of the federal courts have gone, when called upon to determine what constitutes being "engaged in business in a state," and under what circumstances a foreign corporation can be considered "found" within a state for the purposes of citation.

To return to the decision in the principal case, its soundness still remains unimpaired, when we consider the facts as they actually appeared.

The defendant was a Tennessee corporation engaged in the manufacture and establishment of ice machine plants; that was its regular business, such a business as would naturally expand into various states (not necessarily to the extent of having factories or fixed places of business therein); it accordingly sent its authorized agent into Louisiana for the purpose of effecting a contract there in the line of its business; the contract was there entered into, and there to be performed by it; it went there by its chief officer to supervise the performance of said contract (the erection of the plant); enforce its terms by an action at law; while there representative capacity and in that capacity alone, 1

dent was served with process in the suit in question, which suit related to the contract and business above referred to.

To repeat the language of Justice WATKINS, such would seem to be "a good and effective service on which a valid judgment may be founded, which may be enforced against any property of the defendant company *within the state*."

It may be added that while the writer concedes the soundness of the decision as limited, considering the facts upon which it was based, he must, nevertheless, admit that the doctrine announced in the federal cases above quoted is equally sound and convincing, and should be followed.

G. H. JENKINS.

Philadelphia, September, 1895.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. & E. HILL, Esq., 734 Duane Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

HAND-BOOK OF INTERNATIONAL LAW. By Captain EDWIN F. GLENN, Acting Judge Advocate U. S. Army. St. Paul: West Publishing Co. 1895.

THE RELIGION OF THE REPUBLIC AND LAWS OF RELIGIOUS CORPORATIONS. By Dr. A. J. KYNETT. Cincinnati: Western Methodist Book Concern. 1895.

THE LAW RELATING TO ELECTRICITY. By SIMON G. CROSSWELL. Boston: Little, Brown & Co. 1895.

A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS, AS IN FORCE IN ENGLAND AND THE UNITED STATES. By CAUSTEN BROWNE. Fifth Edition. By JAMES A. BAILEY, Jr., with the coöperation of the Author. Boston: Little, Brown & Co. 1895.

A TREATISE ON THE LAW OF DOMESTIC RELATIONS. By JAMES SCHOULER, LL.D. Fifth Edition. Boston: Little, Brown & Co. 1895.

THE LAW OF NATURALIZATION IN THE UNITED STATES AND OF OTHER COUNTRIES. By PRENTISS WEBSTER, A.M. Boston: Little, Brown & Co. 1895.

OUTLINES OF TRIAL PROCEDURE. By J. L. BENNETT. Donohue & Henneberry (Printers), Chicago. 1895.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SKYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-IV. San Francisco: Bancroft-Whitney Co. 1895.

THE LAW RELATING TO THE PRODUCTION AND INSPECTION OF BOOKS, PAPERS AND DOCUMENTS IN PENDING CASES. AN ADDRESS BY THOMAS J. SUTHERLAND. Chicago: The Gladstone Publishing Co. 1895.

SELECTED CASES, ETC.

AMERICAN RAILROAD AND CORPORATION REPORTS, Annotated. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

CASES ON TORTS. Edited by MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1895.

ILLUSTRATIVE CASES UPON EQUITY JURISPRUDENCE. By NORMAN FETTER. St. Paul: West Publishing Co. 1895.

AMERICAN ELECTRICAL CASES. With Annotations. Volume III. 1889-1892. Edited by WILLIAM W. MORRILL. Albany: Matthew Bender. 1895.

PAMPHLETS.

THE QUIZZER SERIES. Nos. 8 and 9. Questions and Answers on Common Law Pleading (No. 8). By GRIFFITH OGDEN ELLIS and EMIL W. SNYDER. Questions and Answers on Corporations (No. 9). By WM. C. SPRAGUE. Detroit: The Collector Publishing Co. 1895.

THE LAW APPLICABLE TO STRIKES (Prize Thesis, University of Maryland, 1895). By JACOB M. MOSKOW. Baltimore: Printed by King Brothers. 1895.

ANNUAL ADDRESS BEFORE IOWA BAR ASSOCIATION. By Hon. I. G. KINNE. Des Moines. 1895.

BOOK REVIEWS.

HANDBOOK OF THE LAW OF SALES. By FRANCIS B. TIFFANY.
(Hornbook Series: West Publishing Co., St. Paul, Minn.
1895.)

This volume of only two hundred and fifty pages contains the essence of the law of sales. It is legal nourishment in its most concentrated form, the boiling-down process having been carried to its utmost limit.

Mr. Tiffany has followed as his recipe the excellent plan of analysis and arrangement adopted in the Hornbook Series. This, it will be remembered, consists in the separation and distribution of material into general principles, printed in heavy type; short commentaries upon the principles, divided into paragraphs and printed in a lighter type—these commentaries forming the body of the book; and, lastly, notes, in which alone are collected the authorities. While the tendency of such a handbook is unpleasantly in the direction of a digest, Mr. Tiffany's grasp of subject and fluency of style have produced a different result and preserved for his work all the continuity and interest of a treatise.

He draws in outline, as it were, the entire law of sales, following as he tells us in his preface, more or less closely upon Mr. Benjamin's synopsis. He starts with the principles lying at the basis of the contract, and, then, in one well written chapter after another, unfolds the law governing the sale of a specific chattel; the sale of a chattel not specific; the effects of mistake, fraud, and the failure of consideration; illegality; conditions, warranties, the execution of the contract; and, finally, the rights of action of either party arising on a breach. In the text, as we have suggested, there is nothing but the bare outline of his subject. In the notes, however, will be found all the necessary drapery and details, in the form of references to some twenty-seven hundred precedents.

Notwithstanding the extreme degree of concentration required by his publishers, we are not aware of a single

sentence in which Mr. Tiffany has failed to set forth his meaning clearly. He has succeeded very wonderfully in combining brevity and clearness. Every now and then by a mere passing reference to the reasons for preferring one line of authorities to another, he shows his breadth of view and proves that, if space permitted, he could do much more than "indicate the law." The unique and unreasonable attitude of the Supreme Court of Pennsylvania on the question of the right to rescind, where the purchaser on credit not only was insolvent at the time he purchased but knew himself to be insolvent, does not escape our author. And yet he contents himself with but a few sentences of explanation in the text, and a reference to the cases in a note. In his few sentences of explanation he has shown us what he conceives to be the better line of reasoning.

It will certainly not be long before the profession realizes the debt they owe to Mr. Tiffany for the production of this handbook. The rare, good judgment and ability displayed by him on every page will certainly secure for the volume the success which it deserves.

F. F. KANE.

UNIFORM STATE LEGISLATION. By FREDERIC J. STIMSON. A Paper Submitted to, and Published by the American Academy of Political and Social Science. April, 1895.

The recent conference of the "Commissions for the Promotion of Uniformity in Legislation" has attracted far more attention than any of its predecessors, the various states having become more deeply impressed with the practical importance of the subject.¹

"The first general meeting," says Mr. Stimson, "was held at Saratoga in August, 1892, at the time of the meeting of the American Bar Association. At this meeting seven states only were represented." At the conference in August, 1894, there were twenty-two in all. Mr. Stimson

¹ It will be noticed that this pamphlet appeared in April. The conference met in August at Detroit.

was chosen secretary at the first meeting, and, is, therefore, well qualified to discuss the question of Uniform State Legislation and to tell us what has been accomplished in that direction. His pamphlet (containing only thirty-six pages), without attempting to enter into a minute discussion as to what are and what are not proper subjects for uniformity, directs attention to the general merits of the case.

After reminding us that we are living under a fourfold system of law, the author disclaims any desire to touch our system of state and Federal government "with the resulting system of state and Federal courts," but expresses the hope that "by voluntary and simultaneous action—the same action which led to the adoption of the Federal Constitution—the several states may gradually be brought to enact the same statutes on all purely formal matter, on most matters of trade and commerce, and in general on all those subjects when no peculiar geographical or social condition or inherited custom of the people demands in each state a separate and peculiar statute law."

Then, after tracing historically the causes which led to the diversity of ante-revolutionary statute law, but before taking up in detail the subjects selected as examples of laws which demand a uniform adoption, the author calls attention to the fact that it is not as if the states and territories had each a wholly different statute upon any subject, but that not more than three or four *different* statutes are found, in them all, upon any one subject. The similarity in the statutes is observable in groups of states, one having set an example which has been followed by other usually, but not always, neighboring states. And there are many statutes, such as those upon limited partnership, where the law throughout the whole United States is now nearly identical.

"The diversity, however, even between adjoining states of like conditions is very great," and to illustrate this the difference between the laws of New York and those of Connecticut as regards marriage, divorce, the descent of property, etc., is cited.

The reason for the wide diversity in statutes enacted since

the Revolution is then taken up, and the states divided into four classes: (1) Code States; (2) States which "go far in what may be termed the *enactment* of the common law, and in *addition*, also; (3) States which are generally inclined to add to, or occasionally to alter, the common law, rather than to enact it over in their statutes," and (4) "the conservative states, which retain the common law most nearly intact."

An interesting sketch of the history of the movement for national unification of law then follows, showing the steps which led to the appointment of state commissions, the promotion of the conference, the slow but certain gain from year to year, and the particular subjects which have thus far recommended themselves to the attention of the commission.

To quote from this, the portion of the pamphlet of the greatest practical importance and interest to the reader would occupy too much space. It is only necessary to say that every lawyer who is appreciative of the good practical results to be obtained by the success of the movement for Uniform Legislation should not fail to read what Mr. Stimson has to say about it.

W. S. ELLIS.

CURRENT EVENTS

OF GENERAL LEGAL INTEREST.

The deaths within the past sixty days of Howell E. Jackson and William Strong—the former an active member and the latter a retired member of the Supreme Court of the United States—call for special notice in the columns of the *LAW REGISTER*. Both had attained the highest judicial station, and both had given the most substantial evidence of great judicial ability, but the friends of both must deplore the fact that neither rounded out a great judicial career, as Bushrod Washington, Story, Miller and Bradley did. This was not due to want of capacity, nor in the case of Justice Strong, to want of opportunity. Ill-health overtook Justice Jackson shortly after his appointment and seriously crippled his powers, while Justice Strong voluntarily resigned his high office after ten years of

The Deaths of
Mr. Justices
Strong and
Jackson

service, at a time when he was in the full vigor of health and at the height of his usefulness as a Judge. Had he retained his place, his judicial reputation would have been higher and the value of his services to the jurisprudence of the nation would have been doubled. This, is true, because judicial reputations ripen slowly. It takes time to make a great judge. No new member of a court, however able, can impress himself either upon his colleagues or the country. He lacks the authority which is due to age and experience, and, although distinguished in other and subordinate positions, he lacks also the influence which flows from a long association of the man with the office, which will lead in time to popular reverence and to general submission to his words as those of an oracle of the law. Had Marshall or Taney or any of their great associates, retired from the bench at the end of ten years, how small comparatively would have been their fame, and how meagre their contributions to federal jurisprudence. Had Moore, or Trimble, or Barbour, or Woodbury, survived for a period of twenty-five or thirty years of active judicial service, would it be necessary to look out their names in a biographical dictionary to ascertain whether they were ever members of the highest court in the nation?

Justice Jackson served but little more than two years, a term shorter than that of any previous member of the court, except Robert Trimble. He had large experience in public life, had been a Senator of the United States, and a Circuit Court Judge, before he was called upon to ascend the Supreme Bench by President Benjamin Harrison—whose judicial appointments were always governed by a high sense of professional duty and a remarkable sagacity in detecting judicial merit. As a Circuit Judge, Mr. Jackson was eminent. No student of the many volumes of the "Federal Reporter" can fail to be impressed with the clearness, the force, and the learning of his judicial utterances. A good example of his power to deal with a complicated state of facts, and of law, and to control a jury by a luminous exposition of principles, is to be found in the case of the *United States v. Harper*, 33 Fed. Rep. 471—one of the famous cases of conspiracy to cheat and

defraud a national bank by a wilful misapplication of its funds and credits. In fact, it was as a criminal judge that Justice Jackson is to be regarded at his best, and in the part which the Supreme Court of the United States has been called on to play under the Act establishing Circuit Courts of Appeals, conferring as it does an extensive appellate jurisdiction in all criminal matters, he has borne a full share and won a fair measure of renown. The manner in which he has pointed out that no writ of *habeas corpus* is to be made the substitute for a writ of error is memorable, while his utterances in cases of murder are important and striking. His constitutional judgments are but few, and not likely to attract attention, save upon the question of the Income Tax, which will always be enhanced in interest by the thought that his opinion was given at a time when death had set his seal upon him, but when the mind rallied to a most unselfish performance of duty, at a critical period of a discussion which attracted universal attention and involved interests of the greatest magnitude.

Justice Strong had been nearly fifteen years in retirement, but it will be recalled that he outlived a most unreasonable and unfounded prejudice against his appointment, owing to his views upon the Constitutionality of Legal Tenders—views which he had expressed in *Schollenberger v. Brinton*, 52 Pa. 1, years before—the soundness of which will never be questioned by those who believe that this country is a nation, and not a loose league of states. It is said that he was Mr. Lincoln's choice for Chief Justice of the United States, but that potential reasons led to the appointment of Mr. Chase. As a member of the Supreme Court of Pennsylvania, Judge Strong had established a reputation for learning and power second to no one of his day, and he carried into the Supreme Court of the United States the qualities of robust common sense, close logic trained in the school of John Locke, and a judicial style which is an admirable model of terse and clear expression. In the important work of extending Federal power to the full and adequate protection of Civil Rights without forgetting the distinction between acts done by individuals and acts done by states, he was especially conspicuous: *Tennessee v. Davis*, 100 U. S.

257; *Reynolds v. United States*, 98 U. S. 145 and *Strander v. West Virginia*, 100 U. S. 303, are interesting examples of his methods of reasoning. At the time of his resignation "his eye was not dim, neither was his natural force abated," and nothing but the sincerest regret can attend his own voluntary act by which, in the midst of a most important and influential career, he became *judex moriens*. HAMPTON L. CARSON.

Owing to the ever increasing importance of the subject of legal education, and particularly to the recent discussion as to the merits of the various systems of teaching, the address of Prof. E. W. Huffcut, of the Cornell University School of Law, upon "The Relation of the Law School to the University"¹ will be read with much interest by all members of the profession not fortunate enough to hear it delivered. The following brief resumé of the address, prepared by the author's courtesy for publication here, will convey a general idea of the conclusion at which Prof. Huffcut arrives:

There were seventy-three law schools open during the past year in the United States for the reception of students. Of these all but seven are connected with the colleges or universities.

Nearly nine thousand students were enrolled in these schools, of whom but twenty per cent. were college graduates. In fifty university law schools the average of college graduates was but ten per cent. In these same schools there are practically no requirements for admission, and when there are any requirements they fall considerably below the requirements for admission to the Freshman class of the college.

The university law schools owe it to themselves and to the profession to lift these standards of legal education. Until very recently there has been no relation whatever, save a nominal one, between the law school and the university. While the standards for admission and graduation in the Universities have steadily advanced, the law schools have made

¹ Delivered before the American Bar Association at its Annual Meeting in Detroit, August, 1895.

little improvement in requirements for admission or in the matter of conforming to university standards of education.

Some advance, however, has been made, though curiously enough it indicates a wide difference of opinion as to the nature of the relation of the law school to the university. Thus far the attempts to create a real relation between the two have taken three quite distinct directions, which, for convenience, may be termed the Harvard plan, the Stanford plan and the Cornell plan.

The Harvard plan is to treat the law school as practically a graduate department of the university. Beginning with the academic year, 1896-97, only those having a baccalaureate degree in arts, literature, philosophy or science from some approved university or college, or those qualified to enter the senior class of Harvard College, will be admitted to the school as candidates for a degree. This insures an adequate preliminary education and is a long step toward raising the standards of legal education. It is obvious, however, that very few schools can venture to follow this leadership for the present. It would be unwise to adopt everywhere a standard which would drive the bulk of the students back into the offices for their legal training.

The Stanford plan is to treat the school as practically an undergraduate department of the university. Students in that university elect any one department for the major part of their work, and, for the purposes of this election, law is placed upon precisely the same basis as any other department. It follows that the requirements for admission are the same for all students whether their major work is law or literature or any branch of the humanities or of science. Those electing law are graduated with the degree of Bachelor of Arts in Law. A post-graduate law course is projected, open, like other post-graduate departments, to graduates who have specialised during the undergraduate course in the corresponding subject. This plan seems an admirable one, but it can be adopted only in universities having a curriculum similar to that of Stanford.

The Cornell plan is to treat the school as an independent organization within the university, but to relate the school to

other departments by permitting juniors and seniors in the University to elect subjects in the law school equivalent to one year of law work, and count the same toward the baccalaureate degree in arts, philosophy or science. If the remaining work of the school is taken after graduation the degree in law is then conferred. By this plan the student shortens the combined work of the college and law courses by one year. The law students who do not come to the school through the university are permitted to elect studies in the college, particularly in history and political science. Some students of this class take a year longer for their law course than is required, and enlarge the course of study by elections in other departments. This plan is followed already in several universities, and it seems with entire satisfaction.

Of the three plans of relating the law school to the university, the third seems, under all the existing conditions, the most practicable. It needs, however, to insure higher qualifications, one additional feature. At present a student may enter the school with a preliminary education lower than that required for admission to the college, and take only the required law work. The door is still open for those who are inadequately prepared. To meet this defect there are two possible remedies. The first is to raise the entrance requirements to about what would be required to enter the the junior class of the college. The second is to require those students who do not come to the schools through the university to take a year longer for their course than those who do, and to occupy the additional time thus required in studies selected from the college. Each of these alternatives has much to commend it, and perhaps there is little to choose between them. Either would certainly raise the standards of legal education.

The University Law Schools ought to face these problems and solve them. The cause of legal education, and therewith the most vital interests of society, is in their hands. The law office is fast losing its function as a training school. The schools are more and more to educate the members of the profession. They ought to educate them in the true university spirit, broadly and deeply, not as makers of craftsmen but as promoters of legal scholarship.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

NOVEMBER, 1895.

PROGRESS OF THE LAW.

AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR OCTOBER.

Edited by ARDENUS STEWART.

We print this month the opinion of Judge RITCHIE, of the Superior Court of Baltimore, referred to last month, in which he holds that the purchaser of a section in a Pullman sleeping car for a given trip has the right, on leaving the train before he reaches his destination, to transfer the use of his section to another first-class passenger, for the rest of the trip for which it was sold.

Carriers,
Passengers,
Pullman
Sleeper,
Transfer of
Ticket

"This suit is brought to recover damages for having been ejected from a certain section in one of the defendant's sleeping cars. So far as it is necessary for me to refer to the facts in the case, they are as follows: On the 30th of September, 1893, Mr. Curlander and his wife, the plaintiffs, left Baltimore upon the Baltimore and Ohio Railroad for Chicago; on the same day some gentleman and his wife, whose names are not known, but whom I will designate as Mr. and Mrs. "X.," boarded the same train at Washington for the same city. All parties were entitled to a first-class passage to Chicago.

"Mr. X. had bought and paid for the use of section number one on the Pullman Sleeper, "Valley Falls," attached to said train, from Washington to Chicago, and held a ticket for the same. The only restriction printed upon this ticket was "Good for this date and car only when accompanied by a first-class railroad ticket." During the day the Pullman con-

ductor took up this ticket and gave Mr. X. in lieu thereof a check for the use of the section in question. This check showed on its face the same trip, that is, from Washington to Chicago, and the only limitation on it touching its use was: 'This check is good for this trip only.' On the evening of the same day, at Pittsburg, Mr. Curlander bought for himself and wife the upper berth of section six in the same car and paid for its use from that point to Chicago. On the next morning, after the car had been arranged for day travel, it was found that the seats which went with the upper berth were those which faced the rear of the car and required the plaintiffs to ride backwards. After riding a short time in this position Mrs. Curlander had a severe attack of nausea; observing her sickness Mrs. X. invited her to a seat in her section, where she rode facing the engine, and was much relieved by her change of position. Mrs. X. then told her that she and her husband would soon leave the car, having determined to get off at Deshler, a station about seven hours distant from Chicago, and said that her husband would give their section to Mr. Curlander so that she would not have to ride backwards. On leaving the train at Deshler, Mr. X. accordingly told Mr. Curlander that he might have his section for the rest of the trip; and transferred to him the check which he held for the same. A little further on, at Defiance, the Pullman conductor, knowing that Mr. and Mrs. X. had left the train, sold the section over again from that point to Chicago to parties who boarded the train at that station. Upon bringing these persons to the section he found it occupied by the plaintiffs. Being requested to vacate and return to their former seats, Mr. Curlander told the conductor that the section had been given to him by Mr. X., and showed him the check which he held therefor, offering to the conductor at the same time the use of his two seats in section six. An altercation ensued, the conductor of the train was called in, and while there is some conflict as to whether the ejection was the act of the defendant or of the train conductor, the plaintiffs were compelled to vacate the section. Soon after returning to her former seat, Mrs. Curlander again suffered from severe nausea

and continued to do so until she reached Chicago. The plaintiff remained in Chicago without special incident until October 10th, meanwhile, from time to time, visiting the World's Fair, and on that day Mrs. Curlander was taken with an illness peculiar to her then condition. She started for home on the 12th, and, though she had not then entirely recovered, she seems to have suffered no material after-effects from this sickness. This sickness also is included as an element in the claim for damages.

"The sleeping car belonged to defendant, and was attached to this train under contract with the railroad company, the defendant being entitled to all proceeds from the sale of seats or berths.

"The important question at the threshold of this case is as to the right of Mr. X., on leaving the train, to transfer the use of his section to Mr. Curlander for the rest of the trip to Chicago. Neither the able counsel nor the court have been able to find any case in which this question has been passed on, or any text-book in which the author expresses an opinion upon it. It is conceded that the ticket for a section on a sleeping car is transferable by delivery at any time before the holder enters upon the journey for which it is purchased, but it is contended that if he once enters upon his trip and leaves the train before arriving at his destination, he abandons or forfeits his right in such section for the balance of the trip for which it was sold.

"If this be so, the passenger having bought and paid for the use of the section for the whole of the designated trip, the restriction against the transfer must be found either in the express terms of the contract, by implication from its terms, or by construction, from the nature of the contract. There is no express provision against transfer, and the defendant contends that the restriction arises from the nature of the contract, and also by implication from some of its terms.

"In the absence of authority upon the direct question as affected by the nature of the contract, the defendant relies upon a supposed analogy between the contract of carriage by a railroad company and a contract for the use of a section on

a sleeping car, and invokes the rule of construction which is applied to the contract of carriage. It is well settled that the usual contract of carriage from one point to another on the same road is an entire contract, involving a continuous trip, though the ticket be silent in this respect, and that when the passenger has once selected his train and started upon his journey, he has no right to stop over at an intermediate point and then resume his journey upon another train on the same ticket. Such a contract is construed to import a continuous trip by the same train because of the nature of the undertaking. The reasons for such construction are fully stated in *McClure's Case*, 34 Md. 532, and the numerous other authorities cited by defendant. But, assuming the analogy claimed, these cases would not control the question here, because in this case there was no effort made to use this section check on a later or another train, but only on the trip for which it was issued. It may be, as defendant contends, that a continuous trip under a contract of carriage, means a continuous trip by the same person as well as on the same train, though I intimate no opinion on that point, but while there are two cases submitted by defendant, in which the courts say *obiter*, that such is the law, they, and all others, were cases in which the original holder or assignee of a partly used railroad ticket, good only for a continuous trip, attempted to use it on another train. Some of the reasons given why the same holder cannot resume his journey on another train might apply to the case of the use of the ticket by another person on the same train, while others would not.

" But assuming that the railroad contract of carriage means a continuous trip by the same person, and on the same train, is there anything in the nature of the contract for the use of a section on a sleeping car that requires a similar construction? The defendant claims that the contracts are analogous, and should receive a like construction. I do not think so. The two contracts are essentially different in character; they are made with different companies, relate to different subject-matters, and are perfectly distinct in their undertaking. The contract with the railroad company is a contract to carry; the

contract with the Pullman Company has nothing to do with the transportation of the passenger, and has no relation to the contract of the railroad company further than that the Pullman ticket, or check, is not good unless accompanied by a first-class railroad ticket. The contract for the use of a section is described in the text-books and in the regulations of the company as a contract of sale—a sale of a given "space" in a designated car. It is a hiring or a *quasi* lease of the section, and gives to the passenger the right to the use of the same with its comforts and conveniences between the points designated on the ticket. This is the right sold and the right paid for. The Pullman Company has no active service to perform under its contract with the passenger; it has only to permit him, without interference, to have the use of the section it has sold him. So far as it does in fact carry the passenger in one of its cars, that is a matter of contract between it and the railroad company, with which alone the contract of carriage is made. The railroad company will carry him in one of its own coaches; or if he contracts with the Pullman Company for the use of a section, the railroad company provides for his transportation in a Pullman car by its contract with the Pullman Company. The distinct character of the contract made by the passenger with each company is shown in *Ulrich's Case*, 108 N. Y. 80.

"When the passenger has selected his train and has called on the railroad company to perform its contract and carry him to his destination, and the company tenders itself ready to perform, and furnishes the necessary means and accommodations, there is good reason why he should not be permitted to stop off at one or more intermediate stations, and afterwards resume his journey on the same ticket. Under the contract of carriage, the railroad company must furnish accommodations and has active services to perform, and when it has once responded to the demand of the passenger and has partly performed its duty and stands ready to perform the rest, it would be unreasonable to require it to stand ready again and again to respond to the call of the passenger according as he may please to break his journey. Further reasons stated in the

authorities why the railroad contract is construed to mean a continuous trip by the same train are that, the contrary doctrine would impose on the carrier additional duties, the removal of the passenger and his baggage from one train to another, an increased risk of accidents, and a hindrance and delay not contemplated. It is contended that the same reasons, or some of them, prevent the passenger when leaving the train from making a valid transfer of his railroad ticket to some one else for the rest of the trip; and further, that the same considerations require a similar construction of the contract made with the Pullman Company. But from the different nature of the contracts, none of these reasons apply in the case of the sale of a section in a sleeping car, and they do not require that a continuous trip under the Pullman contract should be construed to mean a continuous trip by the same person. The contract being for the use of a given section on a given train, necessarily imports a continuous trip by that train, and the Pullman Company needs no protection against a demand for the use of the same section on the same ticket on a later day; no additional duties are imposed on the Pullman Company by allowing the transfer of his section for the rest of the trip by a passenger who leaves the train; it is not subjected thereby to any additional risks, nor to any hindrance or delay; it handles no baggage, no additional attentions are required, and it makes no difference whether the porter makes up the berth and dusts off the seat for one passenger or another. The company sells the use of its section, with the right to some trifling services from its porter, from one point to another, and is paid in full for the same; it can make no possible difference to it whether the section is occupied by one first-class passenger or another, and whoever may hold it, the company can be called upon to do or furnish nothing that it has not agreed to and been paid for. If the holder leaves the train without transferring his section, it might be inferred that he had abandoned it to the company and it might be resold, but when the company undertakes to sell again what it has already once sold and been paid for, it does so at the risk of trespassing upon the rights of others.

"It is held in *Searle's Case*, 45 Fed. Rep. 330, that the purchaser of a section may share its use with any proper persons whom he invites into it; this is because he has purchased the use of the whole section, and as he can bestow on others the right to use part of it while he is there, I can see no reason why he cannot confer upon them the right to continue the use of it when he leaves the train before the end of the trip for which it has been sold. It is also conceded, as I have said, that the purchaser may transfer his section before he enters upon his journey. I can see no reason why it should become absolutely non-transferable the moment after he starts. I can see no reason why he cannot transfer it immediately after starting, if he chooses to ride in a passenger coach; or why two passengers might not exchange sections; or why, after having gone half of his journey, the holder might not then transfer his section for the balance of his trip, and himself withdraw into a passenger coach. It is conceded that he can make such transfers as long as he remains on the train, provided he gives notice to the conductor and gets his assent. But the assent of the defendant to such transfers is not necessary, because there is no condition in the contract which requires it. If the holder of the section, after having gone part of his journey, can transfer it to another for the rest of the trip, he himself continuing on the train but riding in a passenger coach, as I think he can do, he can make a valid transfer on leaving the train, because it makes no difference to the Pullman Company, which has nothing to do with his contract of transportation, whether he withdraws into a passenger coach or leaves the train.

"It is further contended that the condition on the ticket that it is good 'only when accompanied by a first-class railroad ticket,' and the limitation on the conductor's check that it is 'good for this trip only,' and the fact that the through rate from Washington to Chicago is less than the aggregate rate of a section from Washington to Deshler and then from Deshler to Chicago, imply a restriction against transfer after the holder has once started. I cannot accept this view. The condition on the ticket is simply a designation of the class of persons who alone are entitled to avail themselves of the con-

veniences of the sleeping car; it would prevent the transfer of a section to one who did not hold a first-class railroad ticket, but the condition rather implies that such cars are open to all who do have such tickets. 'This trip' means the trip stated on the face of the check upon which is found the restriction, that is, from Washington to Chicago. No attempt was made to use it on any other trip than the trip for which the check expressly states that it was good. Even if 'this trip' under the contract of carriage would from its nature be construed to mean a trip by the same person as well as on the same train, there is nothing, as I have endeavored to show, which would require these words to receive the same construction under the contract in question. To construe this condition as meaning 'good for this trip only and good only in the hands of the holder who starts with it,' would be nothing less than interpolating a material condition not in the contract.

"There is nothing in the fact of a reduced rate which implies non-transferability. It may well be that the company prefers by one transaction to sell a section for a long trip at a reduced rate rather than chance its sale at higher local rates to several successive purchasers between intermediate stations. It is settled that the usual return coupons of round-trip excursion tickets, which are always sold at reduced rates, are transferable: *Carsten's Case*, 44 Minn. 454; *Hoffman's Case*, 45 Minn. 53; *Sleeper's Case*, 100 Pa. 257; and where a through straight ticket over several roads is sold at a reduced rate, the passenger at the end of any one road may transfer any remaining coupons: *Nichols' Case*, 23 Oregon, 123. The condition on a railroad ticket that in consideration of a reduced rate it is not transferable is good, but non-transferability will not be implied from the mere fact of a reduced rate. If the reduced rate does not affect the right to transfer the railroad ticket, there is no reason why it should prevent the transfer of the Pullman ticket.

"It follows from what I have said that, in my judgment, the transfer of the section in question to Mr. Curlander was valid, and the ejection of his wife therefrom was wrongful. There being no restriction upon its transfer in the terms of the con-

tract, except as against such as are not first-class passengers, nor in the nature of the contract, or to be implied from any of its conditions, there certainly are no considerations of public policy or convenience which call on the court to so construe the voluntary contracts of this defendant as to enable it, contrary to the wishes of the first purchaser, to sell the same thing twice."

According to a recent decision of the Supreme Court of Utah, when a passenger leaves the station to which he has come as a passenger, to engage in his own affairs, his relation as a passenger ceases, and the carrier is not liable for an assault on him, on the grounds of the company outside the station, committed afterwards by its section foreman, because of private ill-will, and not permitted by the company; but when, after being thus assaulted, the quondam passenger returned to the station, and was there again assaulted by the section foreman and others, in the presence of the station agent, to whose orders the foreman was subject, but who made no earnest effort to protect him, the company was liable for the last assault: *Krantz v. Rio Grande Western Ry. Co.*, 41 Pac. Rep. 717.

The Supreme Court of California has lately held, that an ordinance which makes it unlawful "for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket, is unconstitutional, inasmuch as it places on the person accused of its violation the burden of showing the innocence of his possession (which would seem to be practically impossible): *In re Wong Hanc*, 41 Pac. Rep. 693.

Upon a trial for larceny the question whether the goods were taken *animo furandi* is a question of fact for the jury; and therefore it has been held lately by the Queen's Bench Division, that a conviction was wrong, on the ground that there had been no finding by the jury that the prisoner had acted *animo furandi* when, at the close of a case in the quarter sessions, the jury announced that they had not agreed

Assault by
Employee after
Passenger has
Came

Constitutional
Law,
Invalid
Ordinance

Criminal Law,
Larceny,
Animo
Furandi,
Finding by
Jury

upon their verdict, but the chairman, having asked them if they believed the evidence for the prosecution, and having received an affirmative answer, directed a verdict of guilty to be entered: *Queen v. Farnborough*, [1895] 2 Q. B. 484.

The Supreme Court of Appeals of Virginia has recently decided a very interesting point of criminal law, to the effect that under the code of that state, §§ 3905, 3906, which provide for sentencing for a life a convict who has been previously twice sentenced to the penitentiary, no one can be so sentenced unless it appears that the previous offences for which he has been sentenced were penitentiary offences in themselves when committed, and not merely made so because of repeated convictions and sentences for offences which would otherwise be misdemeanors: *Stover v. Commonwealth*, 22 S. E. Rep. 874.

Third
Conviction,
Life
Sentence

Statutes which subject a criminal convicted of a second or third offence to a severer punishment therefor, are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The increased punishment is not inflicted for the first offence, but because of the criminal's persistence in crime: *Pro. v. Martin*, 47 Cal. 113; *Kelly v. Pro.*, 115 Ill. 583; *Ross's Case*, 2 Pick. 165; *Sturtevant v. Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Inghalls v. State*, 48 Wis. 647. For the same reason, they are not open to the objection that they are *ex post facto*, even when the prior convictions occurred before the passage of the act imposing the additional penalty: *Ex parte Gutierrez*, 45 Cal. 429; *Commonwealth v. Graves*, 155 Mass. 163; S. C., 29 N. E. Rep. 579; *Blackburn v. State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18; *Rand v. Commonwealth*, 9 Gratt. (Va.) 738. Such statutes, however, cannot apply to the case of a conviction for an offence committed after that for which the prisoner is on trial, but for which he is first tried: *Rand v. Commonwealth*, 9 Gratt. (Va.) 738.

If it is intended to impose upon the criminal the additional punishment for repeated offences, the indictment must allege that the defendant had been previously convicted, sentenced, and imprisoned (once or twice, as the case may be.) in some

penal institution for felonies, (as such penalties are usually only prescribed for felonies or penitentiary offences,) describing each separately: *Tuttle v. Commonwealth*, 2 Gray, 505; *Commonwealth v. Harrington*, 130 Mass. 35; *Sturtevant v. Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Commonwealth v. Walker*, (Mass.) 39 N. E. Rep. 1014; *State v. Austin*, 113 Mo. 538; *Blackburn v. State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18.

As a general rule, the courts have no discretion in the matter of imposing sentence under the habitual criminal acts. If the indictment alleges and the jury finds the necessary facts, the court must impose the additional punishment: *Combs v. Commonwealth*, (Ky.) 20 S. W. Rep. 268; *Sturtevant v. Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Blackburn v. State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18. And if the indictment does so allege and the jury does so find, the additional punishment, if not included in the sentence, cannot be legally awarded against the convict on an information afterwards filed for that purpose: *Plumbly v. Commonwealth*, 2 Metc. 413. It is not necessary, unless required by statute, that the subsequent conviction or convictions should be for the same identical offence or character of offence. It is sufficient if the accused has been convicted of any one of the offences of the grade named: *Kelly v. Pro.*, 115 Ill. 583.

According to the Supreme Court of Michigan, an act which prohibits the printing on the official ballot of the name of a candidate, who receives the nomination of two or more parties, in more than one column, is a valid exercise of the power conferred on the legislature by the Constitution, (Art. 7, § 6), "to pass laws to preserve the purity of elections and guard against abuses of the elective franchise": *Todd v. Board of Election Comrs.*, 64 N. W. Rep. 496.

The question of the validity of irregularly marked ballots seems to be one that it is impossible to settle finally. In *Vallier v. Brakke*, 64 N. W. Rep. 180, the Supreme Court of South Dakota has recently decided a number of

Elections,
Ballots,
Printing
Names of
Candidates

Marking
Ballots

questions with regard to the validity of ballots cast under the laws of that state. These are practically the same as have arisen in most of the other states, but of course depend for their decision upon the wording of the statute. The relevant part of this is as follows :

"The voter, after retiring to the booth as provided by section twenty-five of said chapter, may make a cross in a circle to be printed for that purpose at the head of each ticket, over the ticket he desires to vote, and if he desires to vote for any candidate on any other part of the ballot, he may erase the name of the candidate for that office on his ticket, and place a cross to the left of the name of such person for whom he desires to vote, and in case a voter does not wish to vote a party ticket, he need not cross the circle at the top, but may put a cross at the left of the name of any candidate for whom he wishes to vote": Laws S. Dak. 1893, c. 80, § 4.

"Tickets marked in a circle at the top with a cross showing the intention of the voter to designate such ticket as his vote, shall be counted throughout, except when a name is erased with a lead pencil or otherwise, and a cross to the left of any name on any other ticket shall be taken as a vote for such person : Provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased, or it otherwise appears that no other person has been voted for the same office : " Laws S. Dak. 1893, c. 80, § 6.

These instructions, which seem sufficiently clear and explicit, are thus interpreted by the court :

"The elector may adopt either of four methods in designating the candidates for whom he desires to vote. *First* : He may make a cross in the circle at the head of a party ticket, and in this manner vote the entire party ticket. In such case that ticket is full and complete and constitutes his ticket. *Second* : He may make a cross in the circle at the head of the party ticket, and may erase on that party ticket the names of the candidates for whom he does not desire to vote, and not supply the place of the erased name or names. He then votes the party ticket, except as to the candidates whose names are erased, and as to these the ticket is not filled. *Third* : When the elector has

made a cross in the circle at the head of the party ticket, and erased the name of one or more candidates thereon, he may fill out his ticket in whole or in part by placing a cross to the left of the names of candidates on other tickets, thus making his ticket to consist of the names not erased upon his own party ticket and the places of those erased filled by the name or names of candidates on other tickets. *Fourth*: If the elector chooses, he may omit the cross in the circle at the head of any party ticket, and make up his ticket by placing a cross to the left of the names of such candidates as he desires to vote for upon any ticket on the ballot, the candidates so voted for representing different offices on the ticket." The opinion then states that as the statute has thus declared the effect of the marks, the courts cannot go beyond them in order to ascertain the voter's intention; nor give effect to that intention, if he has failed to substantially conform to the provisions of the law.

According to these principles, it was decided (1) That a cross at the head of the party ticket, but not within the circle, is a nullity; (2) That one or more circles within the circle at the head of a party ticket do not constitute a cross within the circle, and should be disregarded; (3) That a cross at the right of a candidate's name is not a mere informality in the form of marking, but is unauthorized and of no effect; (4) That a straight diagonal line at the left of the name of a candidate is not a cross, and cannot be considered; (5) That erasing a name on a party ticket marked with a cross in the circle at the head, and writing under it the name of the candidate for the same office on another ticket, is unauthorized, and the vote cannot be counted for the latter candidate; (to the same effect is *Parmley v. Healy*, [Supreme Court of South Dakota], 64 N. W. Rep. 186;) (6) But that when the intention of the elector to make a cross is clearly apparent, and the cross is made, whether with a stamp or otherwise, any mere informality in making it should be disregarded; (7) When a cross is made in the circle at the head of a party ticket, and no name is erased thereon, it is to be counted throughout for the party ticket, and no cross or mark opposite the name of any candi-

date on any other ticket can be resorted to to defeat the declared effect of the cross at the head of the ticket; (8) That since the law has made no provision for a cross in the circle at the head of more than one party ticket, crosses in the circles at the heads of two or more party tickets neutralize each other, and the ballot must in such case be treated as if no cross were made at the head of any party ticket; (9) That if the attempted erasure of a candidate's name on a party ticket, properly marked by a cross in the circle at the head thereof, is such that it can be clearly seen that the voter has made an effort to erase the name, and intended in fact to do so, any informality in the mode of erasure should be disregarded; and that an erasure can be made by blotting the name with a cross or crosses by use of the official stamp, as well as by drawing a line through it; (10) That when an elector does not make a cross in the circle at the head of any party ticket, he may indicate candidates for whom he desires to vote by placing a cross at the left of the candidate's name on any ticket, and need not erase any name on the ballot. It was also held that when the voter writes his own name on the ballot, that ballot is marked so that it can be identified, and is void.

In *Buckner v. Lynip*, 41 Pac. Rep. 762, the Supreme Court of Nevada has very sensibly ruled that, although the ballot law of that state (Act, Nev. 1891, c. 40) provides (§ 24) that "no ballot shall be deposited in the ballot box unless the watermark, as hereinbefore provided, appears thereon, and unless the slip containing the number of the ballot has been removed therefrom by the inspector, and (§ 26) that "any ballot upon which appears names, words, or marks written or printed, except as in this act provided, shall not be counted," yet it is proper to count ballots from which the inspector, through ignorance, failed to remove the slips bearing the number, in spite of the fact that his failure to do so made the voter's ballot capable of identification.

The same court has also held that a mark which appears to have been accidentally made, and not from an evil purpose, should not be construed as a distinguishing mark, so as to avoid the ballot. "Adopting this view, a ballot written by a

hand unaccustomed to the use of a pencil, or awkwardness in its use, or carelessness, or an apparent attempt to retrace a clumsily made cross X, or an effort to make it more certain, and in doing so employing more lines than are necessary to properly make a cross, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or across made when the ballot paper was defective, and to avoid the defect, and make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot. . . . But blurred spots, plainly made by a lead pencil, which may have been made for the purpose of cancelling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or the use of a blue lead pencil instead of a black one, [as required by the act.] or a straight line, thus —, over the word "No," or writing a word instead of employing a cross, are grounds for rejecting the ballot:" *Dennis v. Caughlin*, 41 Pac. Rep. 768.

In *In re Garvey*, 41 N. E. Rep. 439, the Court of Appeals of New York has re-asserted the principle laid down by it in *In re Goodman*, 146 N. Y. 484; S. C., 40 N. E. Rep. 769, that, under the Constitution of that state, Art. 2, § 3, which provides that "For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . while a student of any seminary of learning," the intention to change the legal residence must be shown by acts independent of a person's presence as a student, in order to entitle him to vote in the new locality; and applying this rule to the facts of the particular cases before it, decided (1) That evidence that a student coming to attend a seminary as a student notified the registrar of the place of his former residence to strike his name from the voting list, as he had changed his legal residence, and also notified the authorities of the seminary that he had become a resident of the town in which it was situate, h

Voters,
Students

object in so doing being to render himself eligible as a postulant, showed an intent to change his legal residence by acts independent of his presence as a student; (2) That evidence that a person went to a seminary as a student; that he engaged in the business of book-selling, and was also lay reader in a church; that he was not obliged and did not intend, to leave the seminary after his course of study should be ended, did not establish a legal residence in the town where the seminary is situated; and (3) That evidence that a person went to a seminary as a student, and also as a teacher, and intended to establish his residence at the seminary after his course of study should be ended, was not sufficient to show a legal residence in the seminary town.

In *Mitchell v. Charleston Light & Power Co.*, 22 S. E. Rep. 767, the Supreme Court of South Carolina has enunciated

Electric Wires,
Negligence,
Actus Dei

some very interesting principles in regard to the liability of an electric company for damages due to the breaking and falling of its wires, holding (1) That an instruction that if a cyclone that could not be anticipated was the cause of the falling of an electric wire, and, if the defendant was not negligent in allowing it to remain down for an unreasonable time, it would not be liable, is not to be considered as misleading, on the ground that it allows an inference that, if a cyclone which might have been anticipated was the cause, defendant was liable, though not negligent in allowing it to remain down an unreasonable time, when the court has also charged that, if it was the act of God, it could not be anticipated, and defendant would not be liable, but that, on the other hand, defendant was charged with the duty of placing the wires so as to withstand ordinary weather, and was liable if the accident was due to the fact that the wires were improperly erected, or had been allowed to remain on the ground an unusually long time after they were broken down; (2) That such an instruction is not open to the construction that defendant would be liable, though not negligent, if the falling of the wire was caused by a class of storm other than a cyclone, or by a storm of not quite the

same degree of violence as a cyclone, when the word "cyclone" was used because the witnesses had testified that the day was "cyclonic;" (3) That it is proper for the court to refuse an instruction that, if the wire was broken by some cause beyond the control of defendant, no blame could attach to the defendant from the fact that it fell and remained lying in the street, unless it was allowed to remain there "after notice" for an unreasonable time; for the negligence of defendant might have consisted in its failure to know the facts connected with the breaking of the wire, it being bound to use diligence to receive information as to the condition of its wires.

The Supreme Court of Texas has recently decided a very interesting point of international law, holding, in *Mexican Nat. R. R. Co. v. Jackson*, 32 S. W. Rep. 230, that as the laws of Mexico, while making negligence resulting in injury to another a penal offence, also give the injured person a right of action, civil in its nature, the courts of Texas, by enforcing a right of action for personal injuries caused by negligence which accrued in Mexico, do not undertake to enforce a penal law of a foreign country, and therefore do not contravene that principle of international law which forbids the enforcement of such laws by countries other than that of their enactment.

There are probably few rules of law less understood and of more uncertain operation than this one. A general confusion of the technical sense of the word "penal" with its inexact popular usage seems to be almost universal. Within the last few years, the two highest judicial tribunals of the world, the Supreme Court of the United States and the Judicial Committee of the Privy Council, have united in condemning this erroneous habit, and have attempted to clearly define the limits of the rule. In *Huntington v. Attrill* [1893] App. Cas. 150, the latter court, reversing the decision of the Ontario Appeal Court, 18 Ont. App. 136, which affirmed the decree of the court below, 17 Ont. Rep. 245, held that an action to recover a debt due by a corporation from a director thereof, under a

International
Law,
"Penal"
Statutes,
Enforcement
in Foreign
Countries

statute (Laws N. Y. 1875, c. 611, § 21,) providing that "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," while "penal" in the loose popular sense of the word, was not so in its international sense, and could be maintained in a foreign jurisdiction. The true doctrine is thus explained by Lord Watson: "The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country. . . . The phrase 'penal actions,' which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptance, the word 'penal' may embrace penalties for infractions of the general law which do not constitute offences against the state; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. . . . The expressions 'penal' and 'penalty,' when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the statute in the interest of the community, or by private persons in their own interest. . . . A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been

infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorized to prosecute in its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis*, pursued, not in his individual interest, but in the interest of the whole community."

This decision was followed, and its reasoning adopted, by the Supreme Court of the United States, in *Huntington v. Attrill*, 146 U. S. 657, reversing 70 Md. 191, and overruling *First Natl. Bank v. Price*, 33 Md. 487; *Halsey v. McLean*, 12 Allen, 438; *Derrickson v. Smith*, 27 N. J. L. 166; and it may now be considered to be the settled rule in such cases, that no action will be regarded as penal in such a sense as to forbid its maintenance in a foreign jurisdiction, unless it rests upon an offence against the majesty of the state, and not merely against the rights of a private individual; and that even if the two exist side by side, the latter will be enforceable in a foreign court, though the former will not.

In a recent case in the Queen's Bench Division, *Stoddart v. Sagar*, [1895] 2 Q. B. 474, it was decided that the holding of a coupon competition in a newspaper, which was to be carried out by means of coupons, to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third and fourth in a race, the purchaser to receive a penny for every coupon filled up after the first, and a prize of

Letteries,
Coupon
Competition

£100 being promised to any one who would name the first four horses correctly, would not make the promoters of the scheme liable either for opening and keeping an office to exercise a lottery, for selling tickets and chances in a lottery, or for publishing a proposal or scheme for the sale of tickets and chances in a lottery, because the facts stated did not amount to a lottery; nor for opening, keeping and using an office for the purpose of money being received as the consideration for an undertaking to pay money on events and contingencies relating to horse-races, or for receiving moneys as deposits on bets, or for publishing an advertisement inviting all who read it to make bets and wagers on such events and contingencies.

The first distinctive feature of a lottery is, that it consists in a distribution of prizes by lot or chance, without giving those who participate in it an opportunity to win by the exercise of skill or judgment. If this factor is present, it does not matter whether or not the prize to be won is disproportionate to the price paid for joining in the scheme, whether any price is paid or not, or whether there are blanks or not.

As an instance of a lottery scheme pure and simple, the case of *Davenport v. City of Ottawa*, 54 Kans. 711; S. C., 39 Pac. Rep. 708, will serve. The defendant in that case was a partner in a firm which operated a large dry-goods store. The firm placed in its window a locked box, with a glass front, containing twenty-five dollars in bills, and advertised that all persons buying goods in their store, and paying for the same fifty cents or over, would be given a key; that one and only one key which would unlock the box would be given out; and that the person who received the key which would unlock the box would be given the twenty-five dollars from it. The defendant sold goods at the usual and ordinary prices, without extra charge for the key, to various persons, for fifty cents and over, and gave to each of the said persons a key, to which was attached a card stating in substance the above offer. These transactions were held to be in effect sales of merchandise and lottery tickets for an aggregate price. Very similar to this was the case of *The State v. Mumford*, 73 Mo. 647, where the

proprietors of a newspaper issued to each subscriber to their paper, in addition to the paper itself, and without extra charge, a ticket which entitled the holder to participate in a distribution of prizes offered by the proprietors to all persons who should become subscribers, which distribution was to be made by lot. This, too, was held to be a lottery.

Another instance of a lottery device, in this case consisting of chances secured by payment of a price therefor, is found in the proceedings of the various bond investment companies, which have but recently been broken up by the postal authorities. The method adopted was to issue bonds at a specified price, and to make the value of each bond dependent upon its number, the bonds being numbered in the order in which applications therefor reached the secretary of the company. This system of valuation was held to be so far dependent on chance as to constitute a lottery: *MacDonald v. United States*, 63 Fed. Rep. 426.

Even if all those who participate in the scheme draw a prize of some sort, if the drawing is a matter of pure chance, the device is a lottery, and the value of the prize, as compared with the money paid, is immaterial. In *Taylor v. Smitten*, 11 Q. B. D. 207, the appellant sold packets of tea, each containing a coupon, entitling the purchaser to a prize. This was publicly stated by the appellant before the sale, but the purchasers did not know till after the sale what prize they were entitled to receive. The prizes varied in character and value, but the tea was good, and worth the money paid for it. In spite of these facts, the transaction was held a lottery.

If, however, the scheme affords room for the exercise of individual skill and judgment, so that the result does not depend merely on chance, it is not a lottery. This would seem to have been the ground of the decision in *Stoddart v. Sagar*, *supra*, and in *Caminada v. Hutton*, 60 L. J. M. C. 116, which was very much like *Stoddart v. Sagar* in its facts. But it is not so easy to reconcile with these cases that of *Barclay v. Pearson*, [1893] 2 Ch. 154, the case of the "Missin Word Competition." In that case the defendant, who was the proprietor of a newspaper, carried on in connection ther-

with a competition under the following conditions. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for one shilling, to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, together with the result of the competition, in a subsequent issue of the paper; and that the whole of the money received in entrance fees would be divided equally among those competitors who filled in the missing word correctly. This would seem to have afforded a large field for the judgment of the competitors; and yet it was held by STIRLING, J., to be a lottery, so far at least as to prevent the successful competitors from recovering the prize moneys from the defendant. The judge put his decision upon the ground that the selection of the word to be supplied rested on the arbitrary choice of the defendant, and was therefore a matter of chance. But, granting the fact, it does not follow that the inference is correct; for the "chance" which makes a scheme a lottery is not chance in the selection of the criterion of distribution, but chance in the distribution itself. If the criterion is unknown, then the distribution is a matter of pure chance, and the scheme is a lottery; but, if the criterion is known, and it lies in the power of each competitor to shape his competitive efforts with regard to that criterion, his individual judgment comes into play, and the device is not a lottery. These criticisms, however, do not apply to the decision in the particular case, but to the reasons given therefor, which seem to have been too broadly stated. The true basis for holding that competition a lottery is, that the missing word was selected in such a manner that any one of a hundred different words might fill the gap equally well with that selected, and there could therefore be no judgment exercised, but only mere guesswork.

Another essential element of a lottery device is, that the participator should part with something of value in order to obtain a right to participate in the distribution ; and if this is not the case, the scheme is not a lottery. Thus, in *Cross v. Pro.*, 18 Colo. 321, the defendants published the following advertisement :

" Given Away—D. K. Cross & Co., give away pianos to advertise their shoe store, 1552 Larimer street, Denver, Colorado. Every customer receives our numbered business cards, or one will be sent to any address on receipt of stamp for postage, or given to each adult person registering their name at our shoe store."

It was understood that the pianos were to be allotted by some method of chance ; but the court held that it was not a lottery, on the ground that no valuable consideration was required of the participators, as was clearly shown by the advertisement.

A *nolle prosequi* entered in a criminal prosecution constitutes a sufficient termination of the prosecution to authorize the defendant to maintain an action for malicious prosecution, unless the record shows that the *nolle prosequi* was entered at his instance : *Marcus v. Bernstein*, (Supreme Court of North Carolina,) 23 S. E. Rep. 38, 1895.

The Supreme Court of Indiana has recently ruled, in *City of South Bend v. Martin*, 41 N. E. Rep. 315, in accordance with the consensus of authority, that one who goes from house to house with articles of commerce, offering them for sale, and delivering them as sold, is engaged in peddling ; and that an ordinance prohibiting peddling without a license is not an interference with interstate commerce, when it is sought to apply it to a person who takes about with him chairs sent to him to sell as agent, by a manufacturer in another state, and delivers them at the time the sales are made ; and that it is immaterial that the sales are made on the instalment plan, and that the title remains in the manufacturer until the full price is paid.

Malicious
Prosecution,
Nolle Pro.

Peddling,
License,
Interstate
Commerce

One who goes from house to house with rugs, leaving them at a stipulated weekly payment, the title to pass to the party renting the rug when the whole amount of the rental is paid, is a peddler, within an ordinance requiring peddlers to have a license: *Piv. v. Sawyer*, (Supreme Court of Michigan), 64 N. W. Rep. 333.

There is a brief note on the general question of the elements required to make one a peddler, in 2 AM. L. REG. & REV. (N. S.) 569.

According to a recent decision of the Supreme Court of Nebraska, the amendment of a statute does not repeal it so that a subsequent statute, which professes to amend the original act, is invalid: *State v. Bemis*, 64 N. W. Rep. 348.

There is a full annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 566.

Judge KEEKEWICH, of the Chancery Division, has lately held that registration of a design, under the English statutes, does not protect the idea of the designer, but only the actual design; and that therefore, when the plaintiff had registered a design consisting of a church window of a particular style of architecture, with tracery above and below, which they applied in metal work to the sides of upright hexagonal oil stoves, and the defendants adopting the plaintiff's idea, produced a design consisting of a church window of a different style of architecture, with different tracery above and below, which they also applied in metal work to the sides of hexagonal oil stoves, the latter design could not be considered an infringement of the former, as the two designs were essentially different: *Harper v. Wright & Butler Lamp Mfg. Co., Ltd.*, [1895] 2 Ch. 593.

A POINT OF CONSTITUTIONAL LAW.

By PAUL R. SHIPMAN.

A few days after the signing of the Federal Constitution, Oliver Ellsworth and Roger Sherman, two of the delegates of Connecticut in the Constitutional Convention, wrote to the governor of that State, saying among other things concerning the new constitution: "What may be necessary to be raised by direct taxation is to be apportioned on the several States, according to the number of their inhabitants; and although Congress may raise the money by their own authority, if necessary, yet that authority need not be exercised, if each State will furnish its quota." Upwards of a year later, Mr. Madison, in a letter recently published, expressed the same opinion, though incidentally as well as argumentatively. "Every State," said he in this letter, "which chooses to collect its own quota, may always prevent a federal collection, by keeping a little beforehand in its finances, and making its payment at once into the federal treasury." HAMILTON in the *Federalist* had previously argued to the like effect, although, with his usual perspicacity, he discriminated apportionment as a step in federal taxation from requisition, and, while avowing that the federal government might, at its discretion, resort to either, gave no countenance to the notion that the States, at their discretion, might convert the one into the other.

This general view, formed more or less under the influence of the after-image of the Confederation, from which the writers had just withdrawn their gaze, and perhaps in some degree under the pressure of inconvenient objections to the constitution which they had shared in framing, and of which they were zealous defenders, produced little or no impression on their contemporaries, and had been forgotten by posterity, at least as a formal doctrine, till revived and adopted by the Supreme Court of the United States, in one of the two opinions which Mr. Chief Justice FULLER delivered on its behalf in the

income-tax cases ; it is thus, at this late day, raised suddenly to the dignity of an *obiter dictum* of that august tribunal. Referring in the opinion above-mentioned to the supposed motives of the States in granting to the general government the power of direct taxation, the Chief Justice says : " They granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government." This, it will be seen, is an explicit adoption of the Sherman-Ellsworth-Madison notion, in a very definite form.

Is the view constitutional ? If it is, to plunge at once into the middle of things, what constitutional objection could there have been had Congress, instead of imposing the late income tax, imposed a land tax, and the State of New York, say, had embraced "the opportunity" to pay the proportion of her citizens "at once into the federal treasury," and proceeded "to recoup" the amount from them by laying that very income tax, deeming it "the most feasible way ?" None. Nor would there have been any if every other State had followed the example of New York ; in which event the land tax imposed by Congress would have been transformed by the States into the vexed income tax, and that odious measure, made more odious by the special inequalities of apportionment, would have been saddled on the country, in defiance of the will of Congress, and without "the fear of judgment" by the Supreme Court. Congress, under the spell of the States, were this doctrine sound, would shoot at a pigeon and kill a crow.

It may be said that the force of this spell depends on the consent of Congress ; but, if Congress may lawfully withhold its consent, the Constitution, in room of "securing the opportunity," makes it about one of the most insecure of sublunary things. Besides, what is this but to say that Congress, having apportioned a direct tax among the States, may constitutionally stop here, and delegate to the States themselves its power to lay and collect the tax ? It means this or nothing. But it is a settled principle of consti-

tutional law that Congress cannot delegate its powers or any of them. The powers of Congress are delegated to it, and can be redelegated only by consent of the sovereign authority that originally delegated them; and this consent, as respects the power of national taxation, is not given even in the exceptional case of duties on imports, respecting which Congress, though it may yield the power to a State, is required to revise and control the exercise of it. If Congress, without the express sanction of the Constitution, could lawfully divest itself of a single power, though for a single exercise of the power, and reinvest it, though only to the like extent, in another agent, it could lawfully redistribute all the powers of the government: the authority that can without usurpation change any part of the organic law can change the whole—is the Supreme authority of the land.

In point of fact, Congress should it delegate or relinquish to the States, or any of the States, the power to levy direct taxes for the support of the general government, would so far forth repeal the Constitution, and return to the Articles of Confederation, under which Congress could do no more than apportion a direct tax among the several States, which reserved to themselves exclusively the power of levying it. An ineffectual effort, it is worthy of note, was made in the Convention of 1787 to perpetuate this reservation in a modified form, by making the power of Congress to levy direct taxes within a State contingent on the omission of the State to pay the quota of her citizens; and several States, in ratifying the Constitution, renewed the effort, by recommending a constitutional amendment placing this restriction on Congress: but nothing came of it, first or last. If, however, Mr. Chief Justice FULLER's construction of the Constitution is just, the dissatisfied States, without knowing it, had already what they wanted; for under the Constitution as it is, according to his *dictum*, the States are secured "the opportunity to pay the amount apportioned, and recoup from their own citizens," and under the Constitution as the proposed amendment would have made it they could have had no more—the "opportunity," obviously, would have been the same, and would have involved the same

principle. So far as principle is concerned, it is indifferent, provided a State herself may constitutionally lay the tax apportioned to her citizens, whether she pays the sum at once out of taxes laid for other purposes, or later, with taxes laid expressly for the purpose. In neither case are the taxes she pays into the federal treasury laid and collected by Congress, as the Constitution requires, but by the State herself, regardless of the constitutional requirement; that is the point. The "opportunity" to pay the sum, if not a constitutional mockery, instead of a constitutional right, includes a reasonable time to raise it, within which time the State without a cent in her treasury at the moment of apportionment may improve the "opportunity" as well as the State with overflowing coffers; then, for an opportunity without time to seize it is not an opportunity, but the denial of one, so that the principle actually implied in the *dictum* is that a State, if she chooses in good faith, may lay and collect the taxes apportioned to her citizens by Congress, whether Congress chooses or not; which is the identical principle of the provision rejected by the Constitutional Convention, and of the amendment subsequently ignored by the States. Observe, the Constitution says, "The Congress shall have power to lay and collect taxes;" it does not say, as the proposition declined and contemned by the framers would have made it say, and what the Chief Justice makes it say anyway, "The several States shall have power, if they choose, to lay and collect the taxes which Congress shall apportion among them." As regards direct taxation, the construction turns the federal government, at the discretion of the State governments, into a government acting on the States, instead of acting, without substitute or interagent, directly on the people. That is not the government our fathers made. It is the government they refused to make.

In our political system, the States have no power to tax their citizens for the support of the national government, directly or indirectly: the power to tax for that purpose, exclusive in its very nature, is delegated to the United States, and, hence, is not reserved to the States, the concurrent power of taxation reserved to the States being the power to tax for

State not for national purposes. The Constitution requires that all indirect taxes imposed by Congress shall be uniform throughout the United States; but, if the States may constitutionally turn the direct tax imposed by Congress into an indirect tax, and lay it themselves in their own way, both the Constitution and the law may be defeated without a violation of either—a *reductio ad absurdum* certainly if there was ever one: the direct tax imposed by Congress might not be laid at all, and the indirect tax laid in place of it, though laid by the proxies or assignees of Congress, and for the behoof of the federal treasury, would not be uniform throughout the United States, but, on the contrary, the casual inequalities of the best laid tax would be aggravated in this case by the inherent inequalities of an apportionment with which indirect taxes have no constitutional connection. The power of Congress to lay and collect taxes for national purposes, uniformly throughout each State or throughout the United States, as the taxes may be direct or indirect, is exclusive for the same reason, among others, that the power of Congress to establish a uniform rule of naturalization is exclusive: if the States could interfere in either case, the required uniformity would be impossible.

But the power, as already said, is naturally exclusive. Its effectual exercise depends on a knowledge of the financial needs of the government, on the ability combined with the direct interest to enforce the lawful supply of them, and on the unity of action throughout. In the normal state of affairs, these three conditions unite in the government that exercises the power on its own behalf, but not in any other government, to say nothing of fifty other governments, more or less, whose concurrent exercise of the power, uninformed in varying degrees, uninterested or interested indirectly, playing at fast and loose, resolving at haphazard, acting at cross-purposes, would lead inevitably to contempt and ruin. The concurrent power of the States to tax the people for the support of the general government would be destructive and absurd. A government's power to tax its citizens for its own support is in the nature of things exclusive not concurrent; we might as well

talk about a man's right of self-defence or self-preservation as a concurrent right.

Moreover, if the power of Congress were not in itself exclusive, it would become exclusive the moment Congress exercised it, the settled doctrine being, in this case, that the States can not enter on the same ground, and provide for the same objects; and, manifestly, when Congress has once enacted that a direct tax shall be laid and collected, it has exercised the power conferred on it in the premises, having definitively entered on the ground, and provided for the objects. Self-evidently, a supreme power and a subordinate power can not occupy the same sphere of authority at the same time.

Furthermore, the power claimed for the States in this relation is not a concurrent power, anyhow, but a vicarious power, which they are to exercise not as coequals of Congress, but as substitutes, holding to Congress the relation that the payee of a bill of exchange holds to the drawer. If the right of the payee to collect the bill were concurrent with that of the drawer to do the same thing, the drawee, between the two, would get pretty badly squeezed. The relation between Congress and the States, however, in this case as in every other, is not commercial at all, but wholly governmental—the imposition of a tax by Congress is an act of legislation, not of business—the instrument of the imposition is a statute, not a negotiable paper—a thing to be obeyed, not bought and sold; and, for the rest, the Constitution knows no vicarious powers, except the vicarious power of government itself, the several depositaries of which are expressly named, and must themselves, as we have seen, exercise their respective powers, without substitution or delegation, under penalty at once of usurpation and of recreancy. A government, indeed, that should depend for its support, by arms or taxes, on a vicarious authority, in place of its own authority, or overtly acknowledge such dependence, would be a political contradiction, and a byword among the nations. As, therefore, the power of Congress is not concurrent, and, like every other substantive power of the Constitution, is incommunicable, it is necessarily exclusive as well as untransferable. The power is

delegated to Congress ; and Congress only, no other agency, State or federal, can constitutionally exercise the power.

For the same reason, the national government has no power to make requisitions on the States—to tax the States, leaving them to tax the people—but solely the power directly to tax the people ; and Congress, in redelegateing this power to the States, virtually or formally, not only would infringe the Constitution, but would at once modify and weaken the government, relaxing, if not surrendering, its national character, and tending to make it once more, what it was aptly called under the Articles of Confederation, “a rope of sand.” The power to make requisitions on the States, and the power to lay taxes on the people, are distinct powers, involving distinct and mutually repugnant principles of government, the one the confederative principle, the other the national principle. The grant of both powers, then, cannot pass by the same specific form of words ; and the Constitution, in granting to Congress the revenue power, employs but one form of words—“to lay and collect taxes, duties, imports, and excises”—which by no force or ingenuity of construction can be made to include the power of requisition. Suppose, to put a case, that the revenue clause of the Constitution, instead of reading, “The Congress shall have power to lay and collect taxes, duties, imports and excises,” read, “The Congress shall have power to make requisitions on the States, lay and collect duties, imports and excises,” would the power “to lay and collect taxes” be granted in this case to Congress ? Unquestionably not ; and as unquestionably the power to make requisitions is not granted by the clause as it stands. If the national power would not pass by the grant of the confederative power, as little does the confederative power pass by the grant of the national power, and still less, if possible, for the confederative power is repugnant to the predominant characteristic of the government. The power of requisition characterizes a league ; and the practical development of the powers of the Constitution, without diverging from constitutional lines, has at length convinced the most skeptical critics, foreign and domestic, that the United States is not a league, but a

nation. With orthodox Americans there has never been a doubt on this subject.

Suppose, to put another case, that the words "and direct taxes" were struck from the apportionment clause of the Constitution, and, consequently, there were no apportionment of direct taxes, but all taxes, direct and indirect equally, were required to be laid under the rule of uniformity, without regard to the population of the respective States, and without mention of the States, would the Constitution in this case, though not prescribing a rule of apportionment, though not authorizing apportionment itself, though not qualifying in any way the simple grant of power to lay taxes uniformly throughout the United States, empower Congress, nevertheless, to make requisitions on the States? Nobody will pretend that it would. Yet in reality the sole effect of apportionment on the power of Congress to lay taxes consists in the obligation to lay direct taxes uniformly throughout each State, in lieu of uniformly throughout the United States; the pith of apportionment lies in the abridgment of uniformity. The several rates of direct taxation in the several States, depending on the rule of apportionment in its application to the gross sum needed, are details, not affecting the nature of the power, or the mode of exercising it.

The Constitution, turning the logical kaleidoscope once more, prescribes the apportionment of representatives and direct taxes in the same terms, and according to the same rule, prescribing in a separate clause, however, that the representatives shall be chosen by the people, as it prescribes in another clause that the taxes shall be laid and collected by Congress. Accordingly, if the taxes apportioned among the States may be constitutionally laid and collected by the States, in spite of the latter clause, the representatives apportioned among the States may be constitutionally chosen by the States, in spite of the former. What is apportioned among the States in either case, bear in mind, is not to be dealt with by the States as they please, but as the Constitution directs, and they may disobey one of these clauses as permissibly as the other; both are inviolable or neither is.

Apportionment, such being the case, does not displace uniformity, but simply specializes it, in the laying of direct taxes. Above all, it does not import into the power of Congress to lay taxes on the individual citizens of the States the alternative power to make requisitions on the States themselves, or, what is the same thing, to receive contributions from them, in commutation of the taxes which it is itself required to lay on their individual citizens. Apportionment is not requisition, nor in the nature of requisition; nor does it, in ever so small a degree, imply, presuppose, or involve requisition, any more than distribution in general does. As a constitutional process, apportionment is purely a means of determining the rate at which Congress shall lay direct taxes on the individual citizens of a State—a stage in the direct taxation of the people by Congress; requisition, on the other hand, is not a stage in federal taxation or taxation at all, but the demand for a lump sum from the State, as a corporate body, letting the State raise the sum as she may, regardless of the methods by which she does it. Requisition has no part in our system of polity, or, for that matter, in any other, speaking strictly; it belongs to the machinery of a league or confederation, not to that of a government proper or body politic. A government is a political organism, self-sustaining and self-perpetuating, inasmuch that, instead of being supported by requisitions, or solicitations of any other sort, it supports itself, by exercising its own authority directly on its citizens. Requisition is essentially foreign to our existing institutions; it is a fossilized relic of our pre-constitutional history. Neither the thing nor the name of the thing can be found in the great charter of our liberties.

A power, if it should not rather be called an impotence, thus at variance not only with the spirit of the government, but with the nature of government itself, is bound to show the plainest and most indisputable warrant for its existence. But where is the warrant of the general government, either to make requisitions on the States, at its own discretion, as *HAMILTON* thought admissible, or to accept requisitions from them, at their discretion, in conformity with the *dictum* of the Supreme

Court? Will Mr. Chief Justice FULLER put his finger on it? This request can scarcely be dismissed as idle. If, to recall the case supposed in the opening of this discussion, a citizen of New York, with invested capital but without land, should pay under protest the income tax imposed on him by the State in recouping the apportioned amount of the national land-tax which she had paid, and should then bring an action for the recovery of the tax against the officer who collected it, basing the action on the unconstitutionality of the tax, and the case, in due course of appeal, should come before the Supreme Court, the request would assume a very practical shape, and, so far from proving idle, would mean business enough. Are the Chief Justice, and the associates for whom he speaks, prepared to produce the warrant, when it is called for?

The answer is not doubtful. Warrant there is none. Congress has no constitutional power to impose taxes on the States, in any case, or in any sense; it is empowered, simply and purely, to impose taxes on the individual citizens of the States. The States, in their corporate capacity, have nothing to do with the power of Congress to lay and collect direct taxes. Congress, in laying a direct tax, regards the States, strictly speaking, not as political bodies so much as territorial divisions, each of which contains a certain number of inhabitants, forming one of the two chief elements in computing the rate of the tax, the other being the assessed value of all the property subject to the tax within the territorial limits of the State. The tax, it cannot be too often repeated, is not imposed on the States or required from them, directly or indirectly; it is imposed, immediately and exclusively, on the individual citizens of the States; and the rule of apportionment is nothing else than the constitutional formula whereby Congress determines what the rate of the tax shall be. The several States, as States, are not considered in the process, and have no right to be considered; they are merely, so far as the national power of direct taxation is concerned, numerical aggregates in an arithmetical problem, and their force in this capacity is exhausted when Congress has apportioned the tax; so that, in lieu of presenting themselves at this stage or any

other in the panoply of their corporate powers, they have already disappeared from the scene even as numerical expressions, and become symbols of notation in a sum that has been done, and rubbed out.

Commentators on the Constitution, indeed, speak of the rule of apportionment, and the rule of uniformity, as if they not only were both rules of laying taxes, but were co-ordinate rules, the one applying to direct taxes, the other exclusively to indirect taxes ; but this idea, prevalent though it may be, is a misapprehension. The rule of apportionment is not a rule of laying taxes of any description, but a rule of determining the several amounts of taxes to be laid on the collective people of the several States ; while the rule of uniformity is in strictness the rule of laying direct taxes and indirect taxes alike, the only difference being that in the case of direct taxes the rule is applied to the people of each State independently—making the taxes uniform throughout the State—and in the case of indirect taxes is applied to the people of all the States collectively—making the taxes uniform throughout the United States. The rule of apportionment, as intimated above, simply narrows the rule of uniformity in its application to direct taxes, without taking the place of it or doing away with it even in this application.

Apportionment is the imposition, according to a certain ratio, of a special gross-sum on the people of each State, but the taxes laid on the people of the State to raise this sum must, like all other taxes imposed by Congress, be laid under the rule of uniformity, restricted in its application in this case, as has just been said, to the people of the same State, in place of its unrestricted application, in the case of indirect taxes, to the whole people of the United States. Apportioning a direct tax is not laying it, any more than fixing the gross sum of it is apportioning it. The tax is apportioned among the several States, but laid on their individual citizens, the constitutional phrase, "apportioned among the several States" being an abbreviated expression for *apportioned among the collective citizens of the several States*; and Congress, in laying the tax on the citizens of a State, is required to lay it uniformly

regards its tenure, is not exceptional, much less peculiar ; it stands on the selfsame footing with all the other powers delegated to the United States by the Constitution, and, directly or indirectly, prohibited by it to the States. If a State may constitutionally claim "the opportunity" to exercise this power herself within her own limits, therefore, she may constitutionally claim "the opportunity" to exercise in like manner every other distinctively federal power ; and the United States, viewed from the standpoint of principle, melts into thin air. The *dictum* of the Supreme Court asserts a principle absolutely fatal to the government. The execution of the principle would dissolve the Union.

To be sure, the principle has been acted on in a sense, but in a sense entirely compatible with the validity of this argument ; for the action, in addition to having been partial and infrequent, involved the principle without asserting it, or, so far as appears, distinctly recognizing it, and, besides, was taken not only without judicial sanction or official consideration, before or after, but in the midst of arms, when the Constitution, agreeably to the maxim of Cicero, spoke in faint accents or was silent. *Inter arma silent leges*. It is lamentable, yet natural, that the unconsidered or ill-considered action of the government in a day of peril should be "recorded for a precedent," and "many an error, by the same example," stand ready to "rush into the State ;" but that the eager and not too reputable crowd should be headed by the Supreme Judicature of "the State" itself is surely not less unnatural than lamentable.

To sum up the argument, the power of Congress to lay and collect taxes for the support of the general government is an exclusive power, and, therefore, Congress alone can exercise it. A State cannot exercise it, for as exclusive it is prohibited to the States. Congress cannot delegate, transfer, or assign it, for Congress cannot divest itself of a power with which the Constitution invests it. Here, thrice stated, is the argument in a nutshell ; but to the lay mind perhaps the most effective form of the argument is that which reduces the thesis to its logical results in practice. The conclusion, whichever way we arrive at it, would seem too clear for dispute.

It has not been formally disputed for more than a century. But it is formally disputed now, or, rather, the contrary of it is formally asserted, as we see, in a quarter, and in terms, which challenge the attention of the nation. For in the laying of a direct tax by Congress, if we accept Mr. Chief Justice FULLER's *dictum*, a State may lawfully interpose at the first stage in the execution of the law imposing the tax, demand that the federal government shall submit to the nullification of the law, desisting from the further execution of it, pay into the federal treasury the sum apportioned to her people, and recoup it by taxing them herself in her own way, going so far, if she thinks fit, as to convert the land tax or poll tax imposed by Congress into a tax on whiskey and tobacco, or some other form of excise, with the effect in any event of nullifying the law, and of setting at naught the Constitution, the federal government, meanwhile, blushing or unblushingly, but submissively at any rate, pocketing the money and the affront. The "opportunity" to do all this, asserts the Supreme Court through Mr. Chief Justice FULLER, is secured to the States by the Constitution. In other words, if the States or any of them should claim "the opportunity," the United States could not constitutionally deny it. That is to say, the Constitution secures to Congress the power of taxing the people for national purposes, and at the same time secures to the States "the opportunity" of defeating the power at their pleasure, by the tenure of which, therefore, Congress holds the power. A fitting tenure, assuredly, for a power which, as interpreted by the canons of the Supreme Court itself, is not merely national, but exclusive and indefeasible.

Have the legal profession of the United States considered this grave assertion? If they have not, it is time they had. If they have, it is time they were heard from. It is true, *obiter dicta* are not decisions, and have no binding force, but they are noteworthy opinions, and may be the "seed and weak beginnings" of decisions in the future.

Edgewater Park, Burlington Co., N. J.

life was held not an annuity, and the devisee was required to pay the tax on the stock, the court admitting the difficulty, and citing *Seawell v. Boston*, 18 Pick. 123, as an authority for the opposite view: *Booth v. Ammerman*, 4 Brad. 129; *Comstock v. Honor*, 55 Fed. 803 (see *Flickwir's Estate*, 136 Pa. 374, *infra*). The importance of the distinction is evident when it is remembered that the gift of the produce of a fund, without limit as to time, has been held to amount to a gift of the fund itself. While an annuity charged upon personalty is usually dependent on the legatee's life, the fund reverting to the residuary legatee: *Thobald on Wills*, 4th Ed. 413; *Prichard on Wills*, § 472; *Hill v. Potts*, 8 Jur. N. S. 555; *Hicks v. Ross*, 14 Eq. 141; *Schermehorne v. Schermehorne*, 6 Johns. Ch. 70; *Bates v. Barry*, 125 Mass. 83; *Morgan v. Pope*, 7 Coldw. 541. Where, however, an annuity is given out of the rents and profits, it has been said that the rigid rule has been relaxed and the courts may exercise their judgment; the right to apply the *corpus* to meet deficiencies depending on the intention of the testator: *Delancy v. Van Aulen*, 84 N. Y. 16.

An annuity is a general or a demonstrative legacy according as it is given from the general assets or from a particular fund designated as the source of payment, and in either case is governed by the rules of law applied to that particular class to which it belongs. If the testator leaves sufficient personal estate, that ordinarily will be the primary fund for the payment of the annuity: *De Graw v. Gleason*, 11 Paige, 136; *De Haven v. Sherman*, 131 Ill. 115; *Ingleman v. Worthington*, 25 L. J. Ch. 46. As in the case of an ordinary legacy the testator may charge an annuity upon real estate devised, and by accepting lands so charged, the devisee becomes personally liable for the payment. He cannot take the land without conforming to the requirements of the will: *Davis's Appeal*, 83 Pa. 348; *Reeves v. Engelbach*, L. R., 12 Eq. L. 25; *In re Parry*, 42 Ch. D. 570; *Van Orden v. Van Orden*, 10 Johns. 30; *Wyckoff v. Wyckoff*, 48 N. J. Eq. 113; *Nash v. Taylor*, 83 Ind. 347; *Brotzman's Estate*, 133 Pa. 478. Although charged generally upon the estate, the court may allow the appropriation and investment by the executors of a sum, the income of

which shall be sufficient to pay the annuity. But the residuary estate is not necessarily exonerated by this appropriation: *Merritt v. Merritt*, 48 N. J. Eq. 1; *Davies v. Wattier*, 1 Sim. & S. 463; *Miller v. Vickery*, 64 Me. 490. In the case of *Denis' Estate*, 32 A. 436 (Pa. 1895), the testator gave his wife an annuity of \$5000. On the executor's account, a sum was reserved by the auditor, which was deemed sufficient at the time to produce the income. Subsequently, a deficiency resulted in this income. It was held that the deficiency should be paid from the rents of real estate in the hands of the residuary legatees. The widow, by accepting under the will, was a purchaser for value. "The entire estate," said the court, "real as well as personal, was subject to the charge in her favor, no restraint being placed upon the executors as to the source from which the widow's annuity should be derived." "It is undoubtedly true," it was observed by the court below, "that a legacy, even when charged upon the entire estate of the testator, is payable primarily out of the personalty, and the legatee by permitting an application of the primary fund to some other purpose may thus lose his right to resort to the real estate. But this of course could never be, where the owners of the lands are themselves the persons receiving the real estate which would otherwise have gone to the legatee."

Where the testator himself directs the appropriation by his executors of a special fund to the payment of an annuity, the income of which proves insufficient for the purpose, the will must be examined to determine whether it was the intention to make the gift specific, relieving the *corpus* of the estate, or merely to set apart the fund in order that the annuity may be effectually secured. Unless clearly inconsistent with the terms of the will, the tendency of the courts is to give the annuitant the full yearly sum, without regard to the fund appropriated to its payment, charging the deficiency upon the residuary estate.

In *Boomhower v. Babbitt*, 31 A. 838 (Vt. 1895), the testator, after bequeathing annuities, directed that \$11,000 of the estate be set aside and invested in good real estate securities, and the income used in payment of the annuities. "The language,"

said the court, "points to the security and completeness of the yearly payments, rather than to the relief of the body of the estate from future contingencies. The gift falls within that class of legacies called demonstrative in which the sum given is to be made good out of the general estate upon failure of the particular fund, which is primarily holden for its satisfaction." The court goes on to review the English Navy 5 per cent annuity cases. In *May v. Bennett*, 1 Russ. 370, the testator directed his executors to lay out in what government security they pleased as much money as would produce £ 54, S. 12 per year for his wife. The executor purchased Navy five per cent. annuities, but a deficiency occurred by reason of the reduction of the interest from 5 to 4 per cent. The court held that the deficiency should be made good from the general estate of the testator. On the other hand, in *Kendall v. Russell*, 3 Sim. 424, where the testator gave yearly sums to issue out of a sum of stock in the 5 per cents. Upon conversion of the stock to 4 per cent., it was held that the annuitants were not entitled to have the deficiency supplied from the residuary estate. The court, in *Booth v. Babbitt*, distinguishes this case from the one at bar on the ground that, in the former, the testator had designated the stock to be set apart: See also *Carmichael v. Gee*, L. R. S. App. Ca. 588; S. C., 9 Ch. D. 151; *Graves v. Hicks*, 11 Sim. 551; *Reigard's Appeal*, 125 Pa. 628. Where an annuity is charged on the personal estate, on insufficiency of assets, it will abate rateably with other general legacies: *Univ. of Penna's Appeal*, 97 Pa. 187. But not in the case of an annuity given to a widow in lieu of dower: *Reed v. Reed*, 9 Watts, 263; *McDaniel's Estate*, 47 Leg. Int. 534.

Annuities, if no time is specified, begin from the testator's death: *Gibson v. Bott*, 7 Ves. Jr., 96; *Curran v. Green*, 27 A. 596 (R. I., 1893); *Craig v. Craig*, 3 Barb. Ch. 76; *Waring v. Purcell*, 1 Hill (S. C.), Ch. 193; *Cleveland v. Cleveland*, 30 S. W. 825 (Tex. 1895). This also coincides with the Civil Law doctrine: *Mackeldey's Roman Law*, § 767. In *Eyre v. Golding*, 5 Binn. 472, Chief Justice TILGHMAN said: "There is a difference between a legacy of a sum of money to one for

term of life, and a bequest of a sum to be paid annually for life. In the former case the legacy not being payable till the end of a year from the testator's death, carries no interest for that year. But in the latter the first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with. You must count the time immediately from his death or the legatee will not receive the annuity *annually*." While the Chief Justice laid stress on the word *annually*, later decisions have not maintained the distinction. In *Helyard's Estate*, 5 W. & S., the gift was the trust to put the fund out at interest and pay the interest and income to the beneficiary during her natural life." The court was unable to distinguish this case from *Eyre v. Golding*, saying "interest is in its nature an annual profit; and a direction to pay interest makes it payable annually without anything further:" *Spangler's Estate*, 9 W. & S., 135; *Bird's Estate*, 2 Pars. 170; *Booth v. Ammerman*, 4 Bradf. 129. In *Flickewir's Estate*, Mr. Justice MITCHELL declares "there is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or income of a fund for life; nor between the gift simply of interest and of interest payable annually. Interest accrues *de die in diem*, but it is calculated at a rate per annum. In the popular understanding it is chargeable annually and payable the same way, unless custom, or contract, or specific direction makes it payable at shorter intervals. The idea is so clearly implied that the actual use or omission of the word annual in the will does not seriously affect the purpose and intent of the testator:" 136 Pa. 374; 7 Pa. C. C. 315; *Eichelberger's Estate*, 170 Pa. 242.

It is also a settled rule that an annuity is not subject to apportionment, so that if the annuitant dies before the fixed day upon which the annuity is payable, his representative is not entitled to a proportionate part of the annuity for the time which has elapsed since the last payment: *Dubbs v. Watson*, 2 Pa. D. R. 115. The strictness of the rule, however, has been partially relaxed by the recognition of certain exceptions, as in the case of an annuity given in lieu of dower or for the separate maintenance of a married woman or the support of

minor children: *Stewart v. Suvaia*, 13 Phila. 185; S. C., 7 W. N. C. 407. In Pennsylvania, the exception in favor of a wife or minor child has been confirmed by a line of decisions: *Gheen v. Osborn*, 17 S. & R. 171; *Fisher v. Fisher*, 5 Pa. L. J. 178; *McKeen's Appeal*, 42 Pa. 479; *Blight v. Blight*, 51 Pa. 420. But the exception seems to have been ignored in Connecticut in the case of *Tracy v. Strong*, 2 Conn. 659. In New Jersey, in the *Lackawanna Iron & Coal Co.'s Case*, 37 N. J. Eq. 26, A and his wife conveyed a farm to B, in consideration of B's agreement to pay an annuity to A for life and after his death to his wife. A died and the farm was sold subject to the annuity to the widow. She died five months after an annual payment. It was held that the annuity was to be apportioned to the time of her death, as it was a provision for support.

As previously stated, the writ of annuity lay at common law to enforce the payment of arrears or, if the lands were charged, the remedy might be by distress. These methods have long been superseded by the action of debt or covenant: *Horton v. Cook*, 10 Watts. 124; 1 Waits, Actions & Defenses, 325. In Pennsylvania, when an annuity is charged on land by will, an action of assumpsit in the Common Pleas is the proper method for enforcing the personal liability of the devisee, but the jurisdiction of the Orphans' Court is exclusive to enforce a testamentary charge on the land itself: *Dinsmore v. Ramsay*, 13 Pa. C. C. 119. The Court of Chancery in England has decided in a case where the personal estate was insufficient to pay an annuity created during testator's life, that the annuity must be treated as a debt of the testator and apportioned between the three devised estates: *In re Harrison*, 43 Ch. D. 55; *In re Earl of Lucan*, 45 Ch. D. 470. Arrears of annuity, it may be added, do not, as a rule, carry interest: *Theobald on Wills*, 4th Ed. 155; *Torre v. Brown*, 5 H. L. 555; *Wheatley v. Davies*, 24 W. R. 818.

A bill in equity will lie to enforce the payment of an annuity charged upon land or to compel an additional appropriation from the residuary estate to meet a deficiency in the fund upon which the annuity is secured: *Merritt v. Merritt*, 48 N. J.

Eq. 1; *Marshall v. Thompson*, 2 Munf. 412. In a recent English case, where an annuity charged upon the *corpus* of settled real estate was in arrear, the opinion of the court was that it had power to order the arrears to be raised by sale or mortgage of sufficient part of the estate: *In re Tucker* (1893), 2 Ch. 323. But the making of such an order is a matter not of course but of discretion: *Cupit v. Jackson*, 13 Price, 721; *Hambro v. Hambro* (1894), 2 Ch. 564; *Groves v. Hicks*, 11 Sim. 551. Application for the construction of wills involving annuities may also be made under the Conveyancing Act of 1881, 44-5 Vict., c. 41, § 5; *In re Fremes' Contract* (1895), 2 Ch. 256.

WM. H. LORD, Jr.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. KILA, Esq., 726 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

HAND-BOOK OF INTERNATIONAL LAW. By Captain EDWIN F. GLENN, Acting Judge Advocate U. S. Army. St. Paul: West Publishing Co. 1895.

THE LAW OF NATURALIZATION IN THE UNITED STATES AND OF OTHER COUNTRIES. By PRENTISS WEBSTER, A. M. Boston: Little, Brown & Co. 1895.

THE LAW RELATING TO ELECTRICITY. By SIMON G. CROSSWELL. Boston: Little, Brown & Co. 1895.

THE RELIGION OF THE REPUBLIC AND LAWS OF RELIGIOUS CORPORATIONS. By Dr. A. J. KYNETT. Cincinnati: Western Methodist Book Concern. 1895.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By SEYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-IV. San Francisco: Bancroft-Whitney Co. 1895.

INTRODUCTION TO AMERICAN LAW. Designed as a First Book for Students. By TIMOTHY WALKER. Tenth Edition. Revised by CLEMENT BATES. Boston: Little, Brown & Co. 1895.

THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY. By GEORGE S. BOUTWELL. Boston: D. C. Heath & Co. 1895.

HANDBOOK OF THE LAW OF TORTS. By EDWIN A. JAGGARD. (Hornbook Series, No. 10.) Two volumes. St. Paul: West Publishing Co. 1895.

A TREATISE ON LAND TITLES IN THE UNITED STATES. By LEWIS M. DEMBITZ. Two volumes. St. Paul: West Publishing Co. 1895.

SELECTED CASES, ETC.

AMERICAN RAILROAD AND CORPORATION REPORTS, ANNOTATED. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

CASES ON TORTS. Edited by MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1895.

ILLUSTRATIVE CASES UPON EQUITY JURISPRUDENCE. By NORMAN FETTER. St. Paul: West Publishing Co. 1895.

THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. and EMERSON E. BALLARD. Vol. 3. Crawfordsville, Ind.: The Ballard Publishing Co. 1894.

PAMPHLETS.

THE LAW APPLICABLE TO STRIKES (Prize Thesis, University of Maryland, 1895). By JACOB M. MOSES. Baltimore: Printed by King Brothers. 1895.

ANNUAL ADDRESS BEFORE IOWA BAR ASSOCIATION. By Hon. L. G. KIRKE. Des Moines. 1895.

BOOK REVIEWS.

AMERICAN ELECTRICAL CASES. Edited by WILLIAM W. MORRILL. Volume III. Albany, N. Y.: Matthew Bender. 1895.

The third volume of this series contains complete reports of over one hundred selected cases. A comparison of this volume with the preceding one will disclose some interesting facts relating to the growth and development of electricity and electrical devices. Of the one hundred and thirty cases in Vol. 2, sixty-nine are cases relating to the liabilities of telegraph companies as public carriers of news; while of the one hundred and ten cases in Vol. 3, only forty-two are of that class. In Vol. 2 there are but two cases, which pertain to the subject of the interference of electrical currents, while in Vol. 3 there are ten such cases. Twenty-five or nearly one-fourth of the entire number of cases in Vol. 3 relate to the subject of electric railway companies. These facts are too significant to require comment.

Among the cases of especial interest to be found in this volume are the following: *In re Kemmler*, in which the constitutionality of the New York electrocution laws was maintained; *Banning v. Banning*, in which it was decided that an acknowledgment of a deed may be taken by telephone; four cases which hold that the addressee of a telegram may recover substantial damages for mental suffering alone, and three cases which lay down the doctrine that the contract of sending a telegram is one which in certain cases will be valid and binding when made on Sunday.

The same excellent method of arrangement and indexing has been retained.

EDWARD BROOKS, JR.

THE LAW RELATING TO THE PRODUCTION AND INSPECTION OF BOOKS, PAPERS AND DOCUMENTS IN PENDING CASES. AN

Address delivered by THOMAS J. SUTHERLAND before the Illinois State Bar Association, at Springfield, Illinois, January 25, 1895. With an Appendix, containing Additional Notes and copious Quotations from Authorities: Gladstone Publishing Co., Chicago.

This address was not intended as a text-book, nor in fact, for publication at all, being prepared in the midst of professional engagements which necessarily made it a work of spare moments; but it loses none of its value or authority on that account. Even without an examination of the work itself, the author's name would guarantee its accuracy and worth.

It is doubly welcome to the profession, for the reason that no special work devoted to the subject exists. The law relating thereto, so far as it appears in text-books, is relegated to a chapter in the province of Evidence, where it is of necessity treated briefly, and without that full discussion which, as the present volume clearly shows, is sadly needed by the conflicting decisions thereon. Here these decisions are dealt with at length, and some of them criticised with convincing acumen.

Perhaps the most valuable portion of the work is the discussion of the construction put upon § 9 of c. 51 of the Revised Statutes of Illinois by the Supreme Court of that state. That section provides that "the several courts shall have power in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power, which contain evidence pertinent to the issue." The most recent decision under this section is *Lester v. Pro.*, 150 Ill. 408, which denies the right of a principal to obtain an inspection of his agent's books before trial, in a controversy with that agent. But this, as Mr. Sutherland clearly proves, not only overrules prior cases, but effectually emasculates the statute, making it a mere substitute for the writ of *subpoena duces tecum*, "for which it was never enacted, and never seriously needed," thus unwarrantably denying to the language of the statute "the

construction and force *freely accorded to similar terms by every other court of every English-speaking people.*"

There is also an appendix, containing some additional comments, with quotations from selected decisions, which will be found very useful to those practitioners who do not have ready access to libraries where these decisions may be found *in extenso*. X.

A TREATISE ON THE CONSTRUCTION OF THE STATUTE OF FRAUDS, AS IN FORCE IN ENGLAND AND THE UNITED STATES. By CAUSTIN BROWNE. Fifth Edition. By JAMES A. BAILEY, JR. With the Coöperation of the Author. Boston: Little, Brown & Co. 1895.

In recommending to the profession this new edition of a standard work, it is hardly necessary to descant upon its usefulness. This has already been abundantly proved by the experience of those who have already tried the book. But to those who have not read it, it is proper to say, that they will find no work on this subject at once so compact and complete, so full in its treatment of the essentials of its theme and so clear of useless details, so accurate and yet so concise in its statements as this. It is the one book on the Statute of Frauds that ought to be in the hands of every practitioner.

In the present edition, as the preface states, about nineteen hundred cases, decided since the publication of the last edition, comprising all that are of any lasting importance, have been added. Some have, of course, been omitted, for there are points of law on which the cases pile up with astonishing rapidity; but these are mostly instances in which the law is so well settled that a further citation of authority would only uselessly encumber the volumes. The text has also been carefully revised, with the effect of giving an added clearness to the terse language of the former editions.

There is one noteworthy change in this edition. The list of American statutes has been omitted from the preface, in order, as the author states, to make room for the new matter without materially increasing the size of the volume. This is

to be regretted, as, though it may be true that no serious inconvenience may result from that omission, yet it is always an advantage to have the statutes at hand, in order that the reasons for apparently conflicting decisions in different states may be clearly perceived by reference to the statutes themselves. This, however, in view of the fact that the modern practitioner seems, by all accounts, to care more for decisions, than for the reasons upon which they rest, may not be so serious a defect as it would seem to one of the old régime. In all other respects, the work is decidedly an improvement over former editions.

R. D. S.

A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS,
EMBRACING HUSBAND AND WIFE, PARENT AND CHILD,
GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT.
By JAMES SCHOULER, LL. D. Fifth Edition. Boston:
Little, Brown & Co. 1895.

It is not necessary to say anything in commendation of a work so well and favorably known as this is, and one so comprehensive and at the same time accurate in its treatment of the varied and fluctuating relations included within its scope; and in this new edition there are no salient features of newness to which to call attention. It contains the cream of the new cases on the various branches of its subject-matter, carefully culled; but the practitioner who searches in it for those of purely local interest will be disappointed. It was no part of the author's purpose to make his work a mere collection of details and eccentricities, (such as many cases on these branches of the law unfortunately are,) or to compete with the more voluminous and inflated works on the subdivisions of his subject matter. His original aim was to produce a compact hand book of general principles, for ready reference, and to this aim he has confined himself in the successive editions of his book. His example in this respect may well be commended to others.

Another feature which adds to the value of the book is, that the present edition is also prepared by the author, so that uniformity of expression and treatment is secured in the addi-

tions to the original. The failure to do this is responsible for the chaotic state to which many once valuable text-books have been reduced.

The text of the work has been carefully revised; and many slight verbal changes have been made, which add to the clearness of the statement, or bring it into greater harmony with the present status of the law. These are too numerous to mention; but one may be pardoned for referring to the happy addition to the section (§ 10) in which the author embodies his most admirable "general conclusions as to the law of husband and wife,"—"Under all circumstances, moreover, the physical superiority of the male companion, and his propensity to self-indulgence, are forces which woman will always have to reckon with."

There are special departments of the subject matter to which one could wish that the author had given a little fuller treatment. Such is that of the ante-nuptial fraud of a spouse, (§81) which, while presenting the broad principles of the doctrine, fails to mention the exceptions that have been made in favor of conveyances in favor of children; and fails, too, to include some important recent cases.

There is also one improvement that might well be made;—and that is the furnishing of a fuller index. As the case now stands, it is easier to find some matters by reference to the Table of Contents than by reference to the Index—a state of things which certainly ought not to be. These imperfections, however, do not detract from the real value of the work, which, as said before, needs no further recommendation than the fame it has already gained for itself and its author.

ARDEMUS STEWART.

OUTLINES OF TRIAL PROCEDURE. By J. L. BENNETT, of the Chicago Bar. Chicago: Donohue & Henneberry. 1895.

To the outsider, practice must often seem a huge mass of disconnected details; while the lawyer himself finds the temptation and the tendency almost irresistible to drift into empiricism, and to work by "rule of thumb" alone.

Whatever tends to bring order out of this chaos, by showing that, after all, there are underlying principles which are *sometimes* applied, is to be welcomed; and from this standpoint, one may say a word of commendation for the present pamphlet—for it is scarcely more. When, however, the discussion of practice subjects is made general, and not confined to one jurisdiction, categorical statement and great condensation can rarely be united; so that, while this book aims at being "something akin to Rules of Order," it is really only a collection of conversational hints, too general to be of much practical value in Illinois, and too meagre to be of more than passing interest to the student in his search after fundamentals.

The division into sections, as, though this were a code, embodying absolute rules, strikes one as unnecessary.

S. D. M.

CURRENT EVENTS

OF GENERAL LEGAL INTEREST.

The right of a
Legislature
to limit the
suffrage

The Supreme Court of Pennsylvania is nothing if not original. Its last and most startling performance has been to create a new canon of constitutional construction, which has hitherto escaped the ingenuity of the sages of the law, that of the "policy" of the constitution.

In the decision of the question raised as to the constitutionality of the provision in the statute of that state creating the Superior Court, that in all elections for judges of that court no voter shall cast his ballot for more than six candidates, this is made one of the controlling factors. In answer to the objection that the enumeration in the constitution of certain offices for which only a limited vote can be cast excludes all others not named; the learned judge who delivered the opinion says, if the papers are to be trusted, "the limited voting plan was recognized and adopted in the constitution, because it was deemed wise that as to offices non-partisan in character, or which at least should be, the minority party ought to have representation, and this could only be attained by limiting voting. Does the expression of this thing necessarily exclude other things not expressed? As the same reasons for the plan exist as to like offices thereafter created, is it not a necessary deduction that a like plan like that expressed should be followed? *Does not the whole spirit of the constitution plainly so imply*, while there is not a word indicating that such plan as to other or new courts is forbidden? In the cases specified the constitution is mandatory. It says to the legislature, in thus enumerating them, Thou shalt prescribe the limited voting plan. *In the cases not enumerated it is discretionary.*"

This is wide of the real question, which is not whether the constitution takes away the power of passing such a law from the legislature, but whether the legislature has been granted

that power, in the face of a constitutional provision that "all elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage:" Const. Pa. Art. I, § 5. Such a provision has always been held to create in the qualified citizens of the commonwealth a vested right to the exercise of the suffrage, subject to no restrictions on that right except those prescribed by the sovereign people, acting through the medium of a constitutional convention.

Is such an election as that prescribed in the statute "free and equal?" It is not free, for the voter cannot vote for all the officers to be elected. This objection cannot be pushed aside by claiming, as has been done, that the "election" for Superior Court judges is one and indivisible, for such is not the case.

In order that an election of two or more candidates should be a unit, it is necessary that the ticket on which their names appear should be elected or defeated as a whole; and, if this is not the case, but the individual candidates are elected according to the votes cast, then there is practically an election for each candidate, and a refusal to permit the voter to vote for each is a violation of the constitutional provision. Further, the constitution expressly provides that a voter shall have the right to vote at all elections, (Art. VIII, § 1 :) and if this does not mean for every candidate at an election, it means nothing. For, if it be possible for the legislature to declare that no person shall vote for "more than" any number of candidates for an office, it is equally within its power to prescribe that he shall not vote for "more than" one or more officers to be elected at an election; or, in other words, that if sheriff, assemblyman, prothonotary, recorder, &c., are all to be elected, as they frequently are, at one time, the legislature can limit the voter to casting his ballot for but one of those officers. If the power exists for one purpose, it must for all.

The Supreme Court does not advert to this latter phase of the question; but notice how glibly the court glides over the objection that the constitution means that the voter shall have a right to vote for every candidate.

"No sound reason has been urged in the argument why we should enlarge the scope of the words 'shall be entitled to vote at all elections,' by practically adding also for every candidate or a group of candidates for the same office. The constitution does not say so, and has never been interpreted so to mean. It clearly appears that the interpretation put upon the language of the constitution by those who lived at the time it was framed and adopted was the same as that put upon like language in 1874 by the Legislature of 1895; that the interpretation put upon the constitution of 1838 was acquiesced in by the bar, the courts and the legislature for a period of thirty-five years until the adoption of the Constitution of 1874; that, in two other instances, offices of the highest importance, jury commissioners and delegates to a constitutional convention, were, by legislative enactment, filled on the limited voting plan."

It does not follow, however, as the learned judge assumes, that because an unconstitutional act has not been called in question, that it can be thereby made constitutional. Mere acquiescence in two instances of the kind is not that evidence of long-continued interpretation which is necessary to establish a canon of constitutional construction.

Again, it is also beyond question that such an election as that prescribed by the act under discussion is not "equal." In the State of Pennsylvania there are, roughly speaking, 500,000 voters of the dominant party, and 400,000 of the minority. By the system adopted, these latter votes are given but one-sixth of the voting power possessed by the majority. It would be hard to imagine a clearer case of inequality. But the court seems to have no difficulty in practically construing "equal" to mean "unequal;" and so this little objection does not even halt it for a moment.

This act is also, for the reason above stated, an "interference" with the right of the voter to cast his vote at an election. It will be objected that the provision of the constitution does not apply to a law passed by the legislature, limiting the right of suffrage, but to interference with an elector at the polls. Yet the legislature is a "civil power," and if it pass a law forbid-

ding any class of citizens to vote, it would be as effectual as "interference" with the freedom of the election as the action of any body of police or armed force could possibly be. True, it would violate another provision of the constitution; but that would not make it any the less a violation of this.

It is, therefore, hardly open to question that the electors possess a vested right to vote for every candidate at an election, unless they have surrendered that right; and it is equally beyond doubt that the provision of the act cited is an infringement of that right. The whole question, accordingly, turns on the power of the legislature to enact such a provision, which it has at least no *prima facie* right to enact. This right is demonstrated by the court by the simple assertion that the right to establish limited voting is, in all cases not enumerated in the constitution, discretionary with that body; and that assumption is supported by the following supposititious reasoning, "whatever the people have not by their constitution restrained themselves from doing, they, through their representatives in the legislature may do. This latter body represents their will just as completely as in a constitutional convention. In all matters left open by the written constitution of the use the people may make of this unrestrained power, it is not the business of the courts to inquire." This is begging the question, which is simply, as said before, whether the legislature possesses the power to pass such a law. It needs more than a simple assertion of this right to establish it; and yet this is all that the opinion of the court, stripped of its verbiage, and reduced to intelligible language, amounts to.

It may not be amiss to call attention to the peculiar seesaw motion of this court on the general question of constitutionality. It is not many years since it went as far west as California to find a precedent for deciding a mechanics' lien law unconstitutional, and when it did find it, was not deterred from using it by the fact that it rested on a differently worded statute, and had no proper application to the case then in hand. This difficulty was got over by the masterly use of the principle that the legislature cannot interfere with the inherent right of a man to make his own contracts. But this inherent right

is protected by no constitutional provision of which the writer is aware, although one is often cited to support it; and is no more inherent than the right of suffrage. Now, however, the court has disregarded a precisely similar case (*State v. Constantine*, 42 Ohio St. 437), in its eagerness to hold the law now in question constitutional. All of which goes to show that the "wavering balance" is not exactly "right adjusted."

In justice to them, however, it must be added that Chief Justice STERRETT and Justice WILLIAMS dissented.

A SUBSCRIBER.

PENNSYLVANIA BAR ASSOCIATION.

REPORT OF THE FIRST ANNUAL MEETING, HELD AT BEDFORD
SPRINGS, PA., JULY 10 and 11, 1895.

The appearance of this volume is noteworthy as announcing that the bar of another great commonwealth has come into the line of the representative organizations of State Bars. In January, 1895, in obedience to a call signed by 750 members of the Bar of Pennsylvania, representing every county in the state, a convention assembled in Harrisburg, considered the question as to the expediency of forming a state association, adopting by unanimous vote, resolutions to that effect, forming a permanent organization, and adjourning to meet at the call of the executive committee at some appropriate watering place during the summer.

The minutes show, both by the numbers and by the spirit animating the members in attendance, that the time was fully ripe when such association could be formed without any labored effort to create a sentiment in its support.

The opening address by the President, Hon. John W. Simonton, on Pennsylvania Jurisprudence, is not only of great historical value, but is and was intended as significant of the line of development, to the advancement of which the loyal assistance of the association is invoked.

The three papers read before the association by invitation were also most appropriate and valuable in the same direction as indicating the scope of intended action.

The first paper, "The Work of the Bar Association," was read by D. Newton Fiero, Dean of the Albany Law School and President of the New York State Bar Association. Mr. Fiero has long been actively identified with the New York State, and the American Bar, Associations, and therefore able to speak with authority. He dealt with the purpose of bar associations, made a plea against too much conservatism, indicated the obstacles to the work of such associations, illus-

trated largely from the experiences of the New York Association, to which the country looks as a model, by reason of its achieved success, dwelt on the importance of committee work and outlined the essentials to success. The second paper treated of "Legal Education and Admission to the Bar," and was read by Professor George W. Pepper, of the University Law School. It is a most able and thoughtful contribution to this branch of literature, and dealt not only with the advanced methods now the subject of experiment, but also with the proper duties of state and local associations in the premises. The third paper was a vigorous indictment of the indifference to the claims of the profession as a public calling, by Alex. Simpson, Jr., of Philadelphia, under the title of "The Local Bar Association—Its Functions and Relations to the State Bar Association."

In the appendix as supplemental to Judge Simonton's paper on Pennsylvania Jurisprudence, and germane thereto, are reprinted three most valuable papers, *i. e.*, Laussatt on Equity in Pennsylvania; Sharswood on the Common Law in Pennsylvania; and Lewis on Early Courts in Pennsylvania.

The volume contains much of interest to the general reader, but it is chiefly to be welcomed as signalling, as we said, the fact that the Bar of Pennsylvania has organized itself to consider and act in respect to such things as make for the public welfare in the wide domain wherein its members stand sentinel.

Where such an organization is responsive to a general appreciation of the necessity thereof it has great potentialities for effective work. Its machinery must be at once comprehensive, elastic and yet simple. It must be managed on a broad gauge and with sound business principles, and if so conceived and managed, it is well assured of enlisting the active loyalty of the profession of the state, without which it would be but as sounding brass and tinkling cymbals whose sound would soon die away in innocuous desuetude.

State bar associations exist in thirty states (See the able paper on "The Mission of State Bar Associations," by Ralph Stone, of Grand Rapids, Michigan, read before the annual

meeting of the State Bar Associations of New York, 52 Leg. Int. 250 and Albany Law Journal for November 16, 1895), and success or failure can be everywhere measured by the degree of conformity to the conditions precedent hinted at above. Up to this time three of the older states, which boasted of a powerful and learned bar, were conspicuous by their absence, *i. e.*, Pennsylvania, New Jersey and Massachusetts. Pennsylvania, the youngest convert, started out with a membership which is close up to the roll of New York and which promises speedily to place it far in advance thereof. An examination of the proceedings shows this to be due to the pains which were taken to perfect its machinery along lines which puts the association at once in touch with every county in the state. Through its standing committees, on any subject, a referendum can be made to the consensus of the professional judgment of the state, with unrivalled effectiveness and dispatch.

It is this principle that secured for the Pennsylvania Bar Association its magnificent endorsement, and which gives promise of a long career of usefulness and power.

And it is in allegiance thereto that the leaders of the bench and bar have recognized it as a common ground where, on equal footing, they can labor shoulder to shoulder "to clear the foundations, to strengthen the pillars and adorn the entablatures" of the Temple of Justice.

NOTE.—The December number of the *AMERICAN LAW REGISTER AND REVIEW* will contain a note by Hampton L. Carson, Esq., in reply to an article which appeared in the July-August number of the *American Law Review*, entitled "The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress," signed Sylvester Penneyer.

THE
AMERICAN LAW REGISTER
AND
REVIEW.

DECEMBER, 1895.

PROGRESS OF THE LAW.
AS MARKED BY DECISIONS SELECTED FROM THE ADVANCE
REPORTS FOR NOVEMBER.

Edited by ARDENUS STEWART.

In *Hickman v. Dwyers*, [1895] 2 Ch. 638, the Court of Appeal of England has enunciated a rule that seems to rest upon a sound basis of principle, holding that when counsel, acting under general instructions given by his client to compromise a litigation, consents to a compromise under a misapprehension, *e. g.*, when, intending to concede one thing, he inadvertently concedes another, or when the counsel on both sides do not put the same interpretation upon the terms of the compromise, neither the client nor the counsel are bound thereby, and the court will set it aside, on application.

The Supreme Court of Georgia has lately conferred upon the barber fraternity a new distinction, which they will hardly covet. In *Dilberto v. Harris*, 23 S. E. Rep. 112, it held that the proprietor of a barber shop kept for public patronage is liable to a customer for the value of his hat, which was deposited on a hat-rack in the shop, and which disappeared from the shop and was lost while the customer was being shaved, since the proprietor is, in such circumstances, a bailee for hire as to the hat.

Bailee for
Hire,
Barber,
Liability for
loss of
property of
Customer

The court does not deign to fortify its decision by any discussion of the questions involved; but Chief Justice BLEAKLEY, in a dissenting opinion, discourses on the aspects of the case in a way which, while professedly facetious, contains a good deal of common sense, and some keen satire. "It hath never happened," he says, "from the earliest times to the present, that barbers, who are an ancient order of small craftsmen, serving their customers for a small fee, and entertaining them the while with the small gossip of the town or village, have been held responsible for a mistake made by one customer whereby he taketh the hat of another from the common rack or hanging place appointed for all customers to hang their hats; this rack or place being in the same room in which customers sit to be shaved. The reason is that there is no complete bailment of the hat. The barber hath no exclusive custody thereof, and the fee for shaving is too small to compensate him for keeping a servant to watch it. He himself could not watch it, and at the same time shave the owner. Moreover, the value of an ordinary gentleman's hat is so much, in proportion to the fee for shaving, that to make the barber an insurer against such mistakes of his customers would be unreasonable. The loss of one hat would absorb his earnings for a whole day; perhaps many days. The barber is a craftsman laboring for wages, not a capitalist conducting a business of trade or trust."

As a general rule, any one who invites persons to come into his store or place of business, for the purpose of dealing with him, will be held liable for whatever articles it may become necessary that the person so invited should lay aside while engaged in dealing with the tradesman; and therefore a dealer in clothing is liable for the loss of valuables or clothing laid aside while trying on other clothing: *Bunnell v. Stern*, 122 N. Y. 539; S. C., 25 N. E. Rep. 910; *Woodruff v. Painter*, 150 Pa. 91, and the keeper of a bathing establishment is liable for the loss of clothing taken from the bath-house or dressing-room: *Bird v. Everard*, 23 N. Y. Suppl. 1008; S. C., 4 Misc. Rep. 104, or for the loss of valuables delivered by him to one who had stolen the check issued therefor,

when, by looking at the person who presents the check, he could perceive that he is not the one to whom the check was issued: *Tumbler v. Koelling*, 60 Ark. 62; S. C., 28 S. W. Rep. 795.

The keeper of a restaurant is liable for the loss of a customer's overcoat or wraps left in his charge, or taken in charge by his employee: *Ultzer v. Nicols*, [1894] 1 Q. B. 92; *Bultmann v. Dennett*, 30 N. Y. Suppl. 247; S. C., 9 Misc. Rep. 462, but not for overcoats or wraps hung up by the customer himself on a rack provided for the purpose, if he keeps a vigilant watch over the room: *Simpson v. Rourke*, 34 N. Y. Suppl. 11.

A secret contract between persons who propose to bid upon the construction of a public work, that their bids shall be put in apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the work, and has executed the same and received the profits: *McMillan v. Hoffman* (Circuit Court, Dist. Oreg.), 69 Fed. Rep. 509.

In *Durkin v. Kingston Coal Co.*, 33 Atl. Rep. 237, the Supreme Court of Pennsylvania has dealt a severe blow to the unscrupulous labor legislation that is at present epidemic. The act of that state of 1891, June 2, P. L. 176, Art. VIII, § 6, provides that the owners of every anthracite coal mine shall employ a certified mine foreman, who shall examine the working places in the mine to see if they are safe, and permit no one to work in an unsafe place; and Art. XVII, § 8, declares that "For any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby." This the court holds unconstitutional, in a strong opinion by Justice Wil-

**Bids,
Collusion**

**Constitutional
Law,
Liability for
Negligence**

LIANS, of which the following extract contains the gist: "To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor in morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory, under heavy penalties, by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: 'He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employes.' It then says, in effect: 'If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence.'"

The Supreme Court of Rhode Island has recently announced a very peculiar decision, in *Macaulay v. Tierney*, 33 Atl.

Contract in
Restraint of
Trade

Rep. 1, holding that an agreement by the members of a national association of master plumbers to withdraw their patronage from any dealer selling supplies to other than master plumbers is not unlawful, even though "master plumbers" be construed to mean the members of said association.

As a general rule, a person has the right to deal with whom he pleases,—to sell to one, and to refuse to sell to another, or to buy of one, and refuse to buy of another—without regard to the motive which actuates him, and he cannot be held accountable for such action, even if it results in injury to a third party. He has also a right to use any lawful means he pleases to increase his own trade, though the direct result of it is to injure the business of another. Further, what one man may thus do lawfully, any combination of men may do collectively, unless their collective action is of such a

nature that it falls within a prohibitive rule of law that does not apply to individuals. Accordingly, any agreement between individuals, which has for its object the advancement of their own trade at the expense of others, by underselling them, by refusing to deal with them, or by refusing to deal with others who deal with them, is not such a conspiracy or combination in restraint of trade as to render the agreement unlawful, or their acts a cause of action: *Mogul Steamship Co. v. McGregor*, [1892] App. Cas. 25, affirming 23 Q. B. D. 598; *Bowen v. Matheson*, 14 Allen, 499; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; S. C., 55 N. W. Rep. 1119; *Payne v. Western & Atl. R. R. Co.*, 81 Tenn. 507. But if the acts of the parties to the agreement are such that they do not serve a legitimate purpose, but appear to be wanton and malicious, an action will lie at the suit of the party injured. This is clearly the case when the parties defendant and complainant are not in direct competition, but dependent the one on the other, as when a combination of wholesalers refuse to sell to a retailer, or dealers in supplies refuse to supply a tradesman or manufacturer. Each individual may refuse to sell to the complainant; but if they agree not to sell to him, or induce others not to sell to him, they are clearly acting wantonly, and cannot claim that they are acting within their rights: *Dels v. Winfree*, 80 Tex. 400; S. C., 16 S. W. Rep. 111; *Olive v. Van Patten*, (Tex.) 25 S. W. Rep. 428. Such an agreement is a combination in restraint of trade, and therefore illegal; and the very act of inducing another to refuse to deal with the complainant is also illegal. In *Jackson v. Stanfield*, (Ind.) 36 N. E. Rep. 345, the defendant was an active member of "The Retail Lumber Dealers' Association of Indiana," an organization whose by-laws gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in that member's community, and required members to refuse to patronize a wholesaler who ignored the decision of the committee appointed to hear the claim. The plaintiff, who was not a "regular dealer," underbid the defendant on a contract, but wholesalers refused to sell to him, because the defendant had previously enforced a claim against a wholesaler who had sold

to the plaintiff, and expressed an intention of continuing to enforce such claims; and the plaintiff was consequently obliged to abandon the contract. It was held that the defendant was liable for the amount which the plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any one who sold to the plaintiff.

It is on this ground of wanton injury that the illegality of a boycott rests. As usually practiced, it has for its immediate object the destruction of the trade of the person boycotted, if he does not comply with some demand made upon him, with the ulterior design of some benefit to the boycotters therefrom; and is not intended primarily to benefit them, with the destruction of the other's trade as an unfortunate, if necessary, incident. This makes the distinction between a legal agreement and an illegal conspiracy. If the facts in any case prove the latter state of affairs to exist, the agreement and the acts done under it are legal, unless, as has been said, the combination is so extensive as to equal a restraint of trade; but if the former condition is proved to exist, the combination and all acts done in pursuance thereof are illegal. In the case in hand, the primary object of the agreement was not to benefit the business of those who entered into it, but to punish the dealer who acted in opposition to their desires, and, *per se* the court, was therefore illegal; and the complainant was entitled to damages.

The Court of Appeal of England has recently given a very clear and important definition of the duties of auditors in examining and reporting the financial condition of a corporation. It held, that though it is not incumbent on them to consider whether the business of the corporation is conducted prudently or imprudently, yet it is to consider and report to the stockholders whether the balance sheet exhibits a true and correct statement of the condition of the affairs of the corporation, and the true financial position of the company at the time of the audit. This must be ascertained by examining the books of the corporation; and

Corporations,
Auditors,
Duties

they must take reasonable care that what they certify as to the company's financial position is true. And it is also their duty, except in very special cases, to place before the stockholders the necessary information as to the true financial position of the corporation, not merely to indicate the means of acquiring it. Accordingly, in the case in hand, when an auditor presented a confidential report to the directors, calling their attention to the insufficiency of the securities in which the capital of the company was invested, and the difficulty of realizing them, but in his report to the stockholders merely stated that the value of the assets was dependent on realization, with the result that the stockholders were deceived as to the condition of the corporation, and a dividend was declared out of capital, and not out of income, it was held that the auditor had been guilty of misfeasance under § 10 of the Companies' (Winding-up) Act, 1890, and was liable to make good the amount of the dividend paid: *In re London & General Bank* (No. 2), [1895] 2 Ch. 673. It had been previously decided that the auditors of a corporation are "officers" within this act: *In re London & General Bank*, [1895] 2 Ch. 166.

According to the Court of Chancery of New Jersey, a corporation organized under the laws of that state, which is in an insolvent condition, cannot prefer one of its officers as a creditor; and, therefore, when the president of a corporation then insolvent, who was also its creditor to a large amount for cash advanced, brought suit against it on one day, resigned as president and director the next day, and on the third day the directors accepted his resignation, and authorized an attorney to give a cognovit, on which judgment was at once entered, it was held that the president could not have preference by virtue of that judgment: *Mallory v. Kirkpatrick*, 33 Atl. Rep. 205.

Where individuals associate themselves for the purpose of promoting and organizing a corporation for the pecuniary gain of its members, and act as an association by electing directors and other officers through whom contracts are made for and in the name of the proposed corporation, and they afterwards abandon their pur

Preference
of Officers as
Creditors

Promoters,
Individual
Liability

pose to form a corporation; their relation, one to the other, as to persons dealing with the association, if not that of partners, is that of agent and principal, and each will be individually liable upon any contracts of the association which he directly or indirectly authorized or ratified. *START, C. J., in Roberts v. Co. v. Schlick*, (Supreme Court of Minnesota,) 64 N. W. Rep. 826.

The Supreme Court of the United States, in *United States v. American Bell Telephone Co.*, 16 Sup. Ct. Rep. 69, has lately rendered a decision of great importance, as defining the jurisdiction of that court and the Circuit Court of Appeals. By § 6 of the Judiciary Act of 1891, March 3, 26 Stat. at Large, 828, the decision of the Circuit Court of Appeals is made final "in all cases arising under the patent laws." This the Supreme Court holds to refer only to suits at law and in equity for infringement, and to suits in equity for interference and to obtain patents, but not to suits brought by the United States to cancel patents, and therefore an appeal will lie in such cases from the Circuit Court of Appeals to the Supreme Court.

The Australian Ballot Law of Massachusetts (Stat. 1893, Elections, Constitutional Law c. 417,) has just been declared constitutional: *Cole v. Tucker*, (Supreme Judicial Court of Massachusetts,) 41 N. E. Rep. 681.

In *Parker v. Orr*, 41 N. E. Rep. 1002, the Supreme Court of Illinois has decided a number of questions arising under the Ballot Law of that state, holding

Ballots, Validity (1) That under that statute the provision that the voter shall prepare his ballot by marking in the appropriate margin or place a cross opposite the names of the candidates of his choice, is directory merely, and does not, as does the Indiana statute, render invalid ballots which show on their face that the voters attempted to make a cross in the proper place, but did not fully succeed in doing so; and that ballots marked with a cross made either by crossing the line diagonally (X) or vertically (—), were valid:

(2) That writing the word "Yes" or "Get" in the square at the margin of an affirmative vote for a constitutional amendment does not avoid the ballot :

(3) That signing the voter's name to the ballot invalidates it, as it tends to impair the secrecy of the ballot :

(4) That the making of any mark which bears no resemblance to a cross, such as a single stroke, or a circle, or a nondescript scribble, or writing out the party name, or placing a cross wholly outside the proper square, will invalidate the ballot for the same reason :

(5) That the erasure of a name with a lead pencil is not a distinguishing mark :

(6) That when a voter makes crosses opposite the names of two political parties, one of which has no candidate for a particular office, the vote is good only as to the candidate for that office on the other ticket, and a nullity as to the rest :

(7) That when a voter writes in the name of a candidate of his own, and marks a cross so that it is uncertain which candidate it refers to, his vote does not count for either.

In determining the validity of ballots cast under the Australian ballot laws, the fact that the stamp (when one is required,) was not placed on the ballot with such precision as to make a single, perfect impression, will not render the ballot invalid ; but if, in the preparation of the ballot, there is such a departure from the strict letter of the law, that, if purposely done, the ballot could be known by the voter casting it, as when there are imprinted on it two separate and distinct impressions of the stamp, or when there is within one of the large squares a distinct mark, as of a pencil, in addition to the voter's stamp, the ballot will be rejected on the ground that it bears a distinguishing mark, though the mark was made innocently: *Zeis v. Passwater*, (Supreme Court of Indiana,) 41 N. E. Rep. 796.

Who dare say, "*De minimis non curat lex* !" The pencil mark in this case was one-fourth of an inch wide and five-sixteenths of an inch long. What man could say with certainty, "I made that mark?"

In *Williams v. Quebrada Railway, Land & Copper Co.*, [1895] 2 Ch. 751, Judge KEKEWICH, of the Chancery Division of England, has laid down the salutary rule, that when fraud is alleged against a defendant, communications between himself and his solicitor as to the subject-matter of the alleged fraud are not privileged from production, there being no distinction in this respect between a crime and a civil fraud; and that it is immaterial for this purpose, whether the solicitor is or is not a party to the alleged fraud.

Evidence,
Privileged
Communica-
tions.
Discovery.
Fraud

In *Morgan v. Kennedy*, 64 N. W. Rep. 912, the Supreme Court of Minnesota has lately held, that the common-law rule that holds a husband liable in damages for slanderous words uttered by his wife, though he is not present, and has not in any manner participated in the slander, has not been abrogated by the passage of the statutes relating to married women, and enlarging their property rights.

Husband and
Wife.
Husband's
Liability for
Slander by
Wife

The Court of Appeal of England, in *Robins v. Gray*, [1895] 2 Q. B. 501, has affirmed the judgment of WILLS, J., in the court below, [1895] 2 Q. B. 78. In this case a commercial traveler employed by a firm that dealt in sewing-machines went to stay at an inn, and while there machines were sent to him by his employers in the ordinary course of business for the purpose of selling them to customers in the neighborhood. Before the goods were sent the innkeeper had express notice that they were the property of the employers, but he received them as the baggage of the traveler. The latter subsequently left the inn without paying for his board and lodging; and it was held that the innkeeper had a lien on the goods for the amount of his bill.

Innkeeper,
Lien,
Goods of
Commercial
Traveler

The Circuit Court of Appeals, Seventh Circuit, has recently decided a very interesting point of insurance law. An accident certificate issued by the Odd Fellows' Accident Association provided that written notice should be given to the insurer, within ten days of the date

Insurance,
Accident,
Notice

of the accident and injury for which a claim should be made, stating the circumstances of the accident and the nature of the injury, and that there should be no claim to death benefits unless death resulted within ninety days from the accident, of which accident the insurer should have had notice within ten days. While this certificate was in force, the plaintiff, assured stepped on a wire nail, inflicting a small but visible wound in his foot. He continued to pursue his usual occupation for fourteen days, and was then taken ill and died from lockjaw resulting from the wound. No notice of the accident was given within ten days after it occurred, but proofs of death were furnished in due time. Under these circumstances, it was held that the terms of the certificate did not require notice to be given within ten days of the happening of an accident which did not immediately disable the assured from pursuing his usual occupation, and which did not, within the ten days, give rise to a claim for death benefits; and that the beneficiary was therefore entitled to recover: *Odd Fellows' Fraternal Accident Association of America v. Earl*, 70 Fed. Rep. 16.

According to a recent decision of the Judicial Committee of the Privy Council of England, under the treaties between Great Britain and Japan, by virtue of which the consular courts of the former and the territorial courts of the latter have exclusive jurisdiction over claims against British and Japanese subjects respectively, it would be in excess of the jurisdiction granted to the British consular court if it were to entertain by way of counter-claim or cross-action a claim by a British defendant against a Japanese plaintiff; the cognizance of such a claim belongs to the territorial courts. This rule was applied to a suit by the Emperor of Japan against a steam-boat company for damages resulting from a marine collision, in which the defendant company counterclaimed in respect of the same collision, on the ground that it was due to the negligence of the plaintiff's servants; and it was accordingly held that the counter-claim could not be sustained: *The Imperial Japanese*

International
Law,
Jurisdiction of
Consular
Courts

Government v. Peninsular & Oriental Steam Nav. Co., [1895]
App. Cas. 644.

According to a recent decision of the Supreme Court of Pennsylvania, packages of oleomargarine, weighing ten pounds each, put up out of the state, and sent into it, by the manufacturer, to be there sold by his resident agent from his store, by the package, are not "original packages," within the interstate commerce clause of the United States Constitution, but, being intended for sale to the consumer, and being in fact so sold, are subject to the police regulations of the state: *Commonwealth v. Paul*, 33 Atl. Rep. 82.

In reaching this remarkable conclusion, the court rests wholly on its own decisions to the same effect, in *Commonwealth v. Zelt*, 138 Pa. 615; S. C., 21 Atl. Rep. 7, and *Commonwealth v. Schollenberger*, 156 Pa. 201; S. C., 27 Atl. Rep. 30, which in their turn rest on the newly discovered principle that "a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state, for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title." There is also a good deal said in regard to the dire and awful consequences which would result from the opposite doctrine, and the learned judge who delivered the opinion declares that "we cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results," meaning thereby the construction which would hold the separate packages, shipped in an open box or barrel, an original package. But the very strength of his language betrays the weakness of his argument. It is not necessary to vituperate when one is sure of his position.

It is the general opinion that when the bottles or other vessels in which the goods are put up, though each enclosed in a separate wrapper, are put into one common receptacle for

the purpose of transportation, that receptacle is the original package, and, when that receptacle is opened, and the contents are separated, the original package is broken, and none of the separately wrapped packages can be called original. The importer may put up and ship his packages separately in any form he pleases; but, if he puts them up together in the same box or barrel, he cannot claim that they are original packages. The presumption in such a case is that the separate wrapping is a mere device to evade the law: *In re Harmon*, 43 Fed. Rep. 372; *Harrison v. State*, 91 Ala. 62; S. C., 10 So. Rep. 30; *Smith v. State*, 54 Ark. 248; S. C., 15 S. W. Rep. 882; *State v. Parsons*, 124 Mo. 436; S. C., 27 S. W. Rep. 1102; *Halcy v. State*, (Neb.) 60 N. W. Rep. 962; *Commonwealth v. Zelt*, 138 Pa. 615; S. C., 21 Atl. Rep. 7; *Commonwealth v. Schollenberger*, 156 Pa. 201; S. C., 27 Atl. Rep. 30; *State v. Chapman*, 1 S. Dak. 414; S. C., 47 N. W. Rep. 411. If, however, the carrier puts the separate bottles or packages into a receptacle furnished by itself, for its own convenience in transporting them, without the knowledge of the consignor, the receptacle is not the original package. *Keith v. State*, (Ala.) 8 So. Rep. 353; *Tinker v. State*, 96 Ala. 115; S. C., 11 So. Rep. 383.

The Iowa courts alone have seen the absurdities to which this doctrine will lead, and have held that in such a case the separately wrapped bottle or package is the original: *State v. Cowan*, 82 Iowa, 400; S. C., 48 N. W. Rep. 921; *State v. Miller*, 86 Iowa, 638; S. C., 53 N. W. Rep. 330. But this, if applied indiscriminately, is as far wrong as the other doctrine. The only safe rule is, to leave to the jury, as a question of fact, to find whether the separate packages or the receptacle is the original package in any given case, under instructions that if they find that the intent of the importer was to evade the law, not to assert *bona fide* his rights under the interstate commerce rule, that they should find the receptacle to be the original package; otherwise, the separate bottles or packages. To assert that a pint bottle of whisky, wrapped separately, and then boxed with others, is an original package, is absurd; but it is equally absurd to claim that a ten-pound

package of anything is an intentional evasion of the law. And this absurdity cannot be rendered serious argument by an assertion that it is an evasion of the law, because the packages are plainly put up to sell at retail. The law makes no distinction between wholesale and retail sales; and the rules of interstate commerce extend their protection equally over each. If, in the case in hand, the packages of oleomargarine had weighed but an ounce, and yet had been separately wrapped, and carried by the dealer into the state in separate pockets of his overcoat, they would have been original packages, in spite of the evident purpose of selling them at retail; and yet, if two hundred pound packages should be shipped in one box, for convenience sake, they would not be such, under this ruling, although just as clearly intended for wholesale dealing. "A Daniel come to judgment, yea, a Daniel!"

When an attorney of record receives from the defendant a sum less than the amount due on a judgment against the latter, and satisfies the judgment without the consent of his client, the satisfaction will be vacated only on the terms that the plaintiff release and discharge the defendant from the judgment to the extent of the payment made to the attorney: *Faughnan v. City of Elizabeth*, (Supreme Court of New Jersey,) 33 Atl. Rep. 212, 1895.

Since the existence of all committees, in the absence of legislation, necessarily determines upon the adjournment of the body to which they belong, there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or, at least, a clear implication to that effect from the words used in the act or resolution creating the committee, to prevent this determination. Therefore, when a committee is created by the legislature from its own members, to investigate certain facts, and report to the legislature, if it should be possible to do so before its adjournment, and if not, then to the Supreme Court, the committee can do nothing after the adjournment of the legislature, except make

Judgment,
Satisfaction,
Vacating

Parliamentary
Law,
Committees,
Authority

its report : *Commercial & Farmers' Bank v. Worth*, (Supreme Court of North Carolina,) 23 S. E. Rep. 160.

In *Kendall v. Board of Education of City of Grand Rapids*, 64 N. W. Rep. 745, the Supreme Court of Michigan recently decided an interesting point of parliamentary law.

**Suspension of
By-law by
Vote on
Motion** A by-law of the board provided that no text-book should be adopted unless proposed at a regular meeting at least one month before its adoption ; but by-laws could be suspended by a two-thirds vote of the members present. A report recommending the adoption of a text-book was made, and a motion to lay the report on the table was lost by a two-thirds vote, after which the book was adopted by a majority vote. It was held that the by-law requiring the book to be proposed one month before its adoption was suspended by the defeat, by a two-thirds vote, of the motion to lay the report on the table, and that the adoption of the text-book was therefore valid.

The act of Indiana of 1889, March 9 ; Rev. Stat. Ind. 1894, §§ 5186, 5187, requires railroad companies to place in each passenger depot where there is a telegraph office a blackboard, and note thereon whether trains are late, and if so, how late ; and provides that half the fine recovered for violation thereof shall go to the prosecuting attorney. This statute has lately undergone a thorough overhauling by the Supreme Court of that State, in *Pennsylvania Co. v. State*, 41 N. E. Rep. 937, and was held constitutional in spite of the many objections that were made against it. In the opinion, it is decided

- Railroads,
Notice of
Lateness of
Trains,
Constitutional
Law**
- (1.) That it is not void for ambiguity :
 - (2.) That it is not a regulation of interstate commerce, within the prohibition of the federal constitution :
 - (3.) That it is not unconstitutional, as being a local or special act, regulating practice, in courts of justice, on the ground that it provides for special judgments in favor of particular persons and against particular persons ; or that it provides a special statutory action, and authorizes a particular judg-

ment in favor of a particular officer against particular persons; or because it gives a particular officer a part of a penalty, and thereby requires judgment in favor of such officer:

(4.) That it is not local or special, within the prohibition of the constitution of that state against passing local or special laws "in relation to fees or salaries," merely because the prosecuting attorney participates in the recovery, or on the theory that the defendant, aside from its interest in common with that of the people of the state, has an interest in the distribution of the fund recovered as a penalty for its violation of the act:

(5.) That it is not unconstitutional, as granting to any citizen, or class of citizens, privileges or immunities which do not belong equally to all citizens on the same terms:

(6.) That it does not violate the provisions of the federal constitution, that no state shall deny to any person the equal protection of its laws:

(7.) That the fact that there is a railway in the State which has no station or telegraph facilities, but is operated by a system of telephone, to which railway the act does not apply for that reason, does not expose it to the objection that it lacks uniformity.

The appellate court of the same state has lately held that this same act does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the day-time: *Terre Haute & Ind. R. R. Co. v. State*, 41 N. E. Rep. 952, and by a parity of reasoning, it would in any case require the registering only while any telegraph office is open.

This statute is a proper police regulation, which does not interfere with interstate commerce, and is within the power of the legislature: *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817.

It is operative only when the company or person operating the railroad possesses the means of conveying such information to the point where it is to be noted: *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817, and therefore does not apply to stations where there are

no telegraph offices: *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817; *State v. Cleveland, Cincinnati, Chicago & St. L. Ry. Co.*, 8 Ohio Cir. Ct. 604. Nor to railroads whose trains cover their entire route in a time less than that within which the notice is to be posted: *State v. Kentucky & Ohio Bridge Co.*, 136 Ind. 195; S. C., 35 N. E. Rep. 991. The fact that some other company may operate its line of road by telephone, or by some other means of communication, does not invalidate the law, which is confined to those operated by telegraph, on the ground that it is class legislation, for the law applies to all alike who operate roads by means of telegraphic information: *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817; *State v. Pennsylvania Co.*, 133 Ind. 700; S. C., 32 N. E. Rep. 822. The fact that the law gives to the prosecuting attorney an interest in the amount recovered does not affect the validity of the law, as that is a matter in the discretion of the legislature in fixing the compensation of that officer: *State v. Indiana & Illinois Southern R. R. Co.*, 133 Ind. 69; S. C., 32 N. E. Rep. 817.

When an act, which purports to amend a previous act "so as to read as follows," contains a provision different from that of the original act, but on the same subject, it is not a repeal of the previous act, and therefore other statutory provisions relating to the old act, and not inconsistent with the amendment, will apply to the latter: *Fitzgerald v. Lewis*, (Supreme Judicial Court of Massachusetts,) 41 N. E. Rep. 687.

The Supreme Court of Florida, in *State v. Green*, 18 So. Rep. 334, has recently reasserted some principles of statutory construction, which, though frequently expressed, are yet by no means universally adhered to, and are therefore well worth repeating.

(1) The constitutional requirements as to the mode of enacting laws are mandatory, and if the journals kept by the two houses are silent as to matters which are required to be entered in them, or if they show affirmatively and explicitly that other

Statutes.
Amendment.
Effect

Validity.
Legislative
Journals

constitutional requirements have not been complied with in the enactment of a law, the evidence of the journals will control, and the act be held void; but, since every reasonable presumption must be made in favor of the action of the legislature in the apparent performance of its legal functions, it will not be presumed, in any case, from the mere silence of the journal, that either house has disregarded a constitutional requirement in the enactment of a law, unless the constitution has expressly required the journal to show the action taken. In such case, however, their silence will be fatal to the act:

(2) Since the governor acts as a part of the law-making power of the state in approving bills passed by the legislature, and unless substantially the same bill that passed the two houses of the legislature is submitted to him for approval, it cannot become a law by his approval, or by his silence, or against his approval:

(3) If the title of an act as it passed the legislature, and when approved by the governor, is so essentially different as to affect the whole act, it cannot be said that the same act received the sanction of the entire legislative department of the government; but if the difference is immaterial and unsubstantial, it will not avoid the law:

(5) The rule of construction, that, though part of an act be void, it will not render the whole inoperative, if the good and the bad can be separated, and the legislative purpose expressed in the valid portions be given effect to, independently of the void part, applies also to the titles of acts; and if the unconstitutional part can be separated from the other, the latter will stand, and the act be construed with reference to the subject therein expressed.

It will be seen from this, that the Florida court has little sympathy with the absurd idolatry that sees in an enrolled bill a thing too holy to touch, before which, no matter how tainted with fraud, all principles of law and justice must lie inert, if the subject-matter is within the constitutional limits. Attention has been called to the results of that doctrine in commenting on the case of *Carr v. Cobb*, (N. C.,) 22 S. E. Rep. 16; (See 2 AM. LAW REG. & REV., N. S. 441, 503,) and

this decision is now submitted as a very useful antidote to the injurious effects of that.

The Supreme Court of Ohio has recently decided that an act which, professing to impose a tax on inheritances, exempts from taxation the right to receive or succeed to estates not exceeding \$20,000, though taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and taxes the right to receive or succeed to estates of a large value at a higher rate per cent. than the right of succession to estates of smaller value, is in conflict with § 2 of the bill of rights of the constitution of that state, which declares that "all political power is inherent in the people. Government is instituted for their equal protection and benefit;" and is, therefore, wholly unconstitutional and void: *State v. Ferris*, 41 N. E. Rep. 579.

In *Weinstock, Lubin & Co. v. Marks*, 42 Pac. Rep. 142, the Supreme Court of California has held that a tradesman, by adopting the name "Mechanics' Store" for his place of business, may acquire a property right therein as a trade-name, so that equity will enjoin another from using the name "Mechanical Store" in such a way as to induce persons to purchase goods from him under the belief that they are dealing with the former.

In this case a merchant had erected a building of peculiar architecture adjoining a similar building occupied by an old firm engaged in a like business, and with the purpose of deceiving the customers of the firm, adopted a similar name, and refrained from using any sign about the building to designate the proprietor. The court below decreed that he should maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of the store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein; but it was held by the Supreme Court that this was holding the defendant to too strict a rule, and that all that should be required was

that the defendant, in the conduct of his business, should distinguish his place of business from that in which the plaintiff carried on its business, in some mode or form that should be a sufficient indication to the public that it was a different place of business from that of the plaintiff.

The House of Lords has lately held, affirming the decision of the Court of Appeals, [1895] 1 Ch. 145, that the owner of

Waters,
Percolation,
Interference

land containing underground water, which percolates by undefined channels and flows to the land of a neighbor, has the right to divert or appropriate the percolating water within his own lands, by wells or drainage shafts, so as to deprive his neighbor of it; and his right is the same whether his motive be to *bona fide* improve his own land, or to maliciously injure his neighbor, or to induce his neighbor to buy him out: *Mayor, &c., of Bradford v. Pickles*, [1895] App. Cas. 587.

No one can be held liable for damages caused by sinking a well in his own ground, by which the percolating waters are diverted from his neighbor's wells or springs; but if he sinks a well to a plainly-defined underground water-course and diverts it, he is liable for all damages occasioned thereby: *Willis v. City of Perry*, (Iowa,) 60 N. W. Rep. 727; *Castalia Trout Club v. Castalia Sporting Club*, 8 Ohio Cir. Ct. 194; *Williams v. Laidlaw*, 161 Pa. 283; S. C., 39 Atl. Rep. 34; *Sullivan v. Northern Spr. Min. Co.*, (Utah,) 40 Pac. Rep. 709.

According to a recent decision of the Court of Appeal of England, a gift for the encouragement of a mere sport, though

Will.
Charitable
Gift,
Bequest for
Encouragement
of Sport

it may be beneficial to the public, cannot be upheld as charitable; and therefore a bequest of a fund in trust to provide annually forever a cup to be given to the most successful yacht of the season, though it states that the object of the gift is to encourage the sport of yacht racing, is in violation of the rule against perpetuities, and void: *In re Nottage*, [1895] 2 Ch. 649.

The one essential feature of a charitable gift is, that it should be for the benefit of the public, not for that of any number of

private individuals. It is not necessary that its benefits should be bestowed upon the public uniformly; it is sufficient if they are open to all who under the circumstances can avail themselves of them: *c. g.*, a hospital is a charitable institution, because it exists for the benefit of the sick of the community, so far as its resources extend, and also tends to lighten the burden which the support of those sick persons whom it cares for would throw upon the community; but a beneficial society is not a charity, unless its aims are such as bring it within the last-mentioned criterion, for it exists for the benefit of its own members only. Applying this broad rule, a bequest to a society founded for the dissemination of knowledge generally: *Beaumont v. Oliveira*, 4 L. R. Ch. 309; for the maintenance of missions: *Commissioners v. Pennel*, [1891] App. Cas. 531; for the erection of a chapel and the maintenance of a public park: *In re Bartlett*, (Mass.) 40 N. E. Rep. 899; for the relief of the poor and the support of a sabbath-school: *Conklin v. Davis*, 63 Conn. 377; S. C., 28 Atl. Rep. 537; for founding and maintaining an institution for the purpose of studying and curing the diseases of animals and birds useful to man, and providing for free lectures to be given to the public: *University of London v. Yarrow*, 1 DeG. & J. 72, affirming 23 Beav. 159; for the increase and encouragement of good servants: *Lascombe v. Wintringham*, 13 Beav. 87; for the establishment of a fund to be expended in prizes to marksmen: *In re Stephens*, W. N. [1892] 140; and to enable a corporation, organized for the purpose, to purchase land and erect residences thereon for the laboring classes, to be controlled "so as to improve the moral, physical and intellectual condition of the youth of this city," which residences were to be let to laborers for rent, and not gratuitously: *Webster v. Wiggins*, (R. I.) 31 Atl. Rep. 824, are charitable gifts. Such is also a gift to a library, organized as a private corporation, if not organized for pecuniary profit, and not conducted for that purpose, when all the moneys obtained by it are used to maintain the library and purchase books, and all are entitled to the use of the books in the library room, though books may be taken therefrom only by those who become subscribers for a

fixed time and pay a certain fee, or who pay a certain amount for each book without becoming subscribers : *Phillips v. Harrow*, (Iowa,) 61 N. W. Rep. 434; but a library maintained only for the benefit of the subscribers is not a charity, even though all who wish may become subscribers : *Carns v. Long*, 2 DeG., F. & J. 75; *In re Dutton*, 4 Exch. D. 54.

A charity need not necessarily be for an indefinite number of persons; and though a beneficial society whose benefits are confined to its own members is not a charity, yet a gift to the permanent fund of such an organization of public employes is a charitable gift, because it is not only in case of all of those employes who may choose to become members, but tends to benefit the community by preventing their families from becoming a public charge : *In re Jeanes's Estate*, 3 D. R. (Pa.) 314; S. C., 34 W. N. C. 190.

On the other hand, a gift for the purpose of establishing a museum for the purpose of preserving relics of famous men is not a charity : *Thomson v. Shakespear*, 1 DeG., F. & J. 399. Nor is one for the maintenance of certain animals, though, not being a perpetuity, it is a valid trust : *In re Dean*, 41 Ch. D. 552. And if a valid charitable gift is itself conditional on the happening of a future and uncertain event, it violates the rule against perpetuities, and is void : *All v. Lord Stratheden*, [1894] 3 Ch. 265.

In a recent case in the Chancery Division of England, before Judge Kekewich, part of a testator's estate consisted of policies on the life of another, subject to a mortgage to the life assurance office. By his will he bequeathed his personal estate to one person for life, with remainders over. After the testator's death his executor paid the premiums on the policies and the interest on the mortgage out of the income of the personal estate until the death of the assured, when the office paid to the executor the surplus of the policy moneys remaining after deducting the mortgage debt. On these facts, it was held that, as between the tenant for life and the remaindermen, the amount of income expended in paying the premiums and interest ought to be recouped to the tenant for life, with interest, out of the prop-

Life Estate,
Insurance
Policies

erty preserved by the expenditures, viz.: the surplus policy moneys; and that the balance of that surplus must be apportioned between capital and income: *In re Morley*, [1895] 2 Ch. 738.

In calculating the proportions in which outstanding personal estate which falls in during the existence of a life estate, should be divided between capital and income, the proper method is to ascertain the sum which, put out at the legal rate of interest on the day of the testator's death, and accumulating at compound interest calculated at that date with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the rest as income: *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643.

JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION.

By HAMPTON L. CARSON, Esq.,
Of the Philadelphia Bar.

The American Law Review, in the issue of July and August, 1895, published an article entitled "The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress," written by Sylvester Pennoyer. The tone of the article is that of a bitter and contemptuous attack upon the highest tribunal of the nation, and contains a greater number of absurd and indefensible positions than is common to articles of this character.

It is evident that Mr. Pennoyer does not think well of the Supreme Court, and the reason is not far to seek. In the case of *Pennoyer v. Neff*, 95 U. S., p. 714, he was prevented by the judgment of that tribunal from maintaining possession of the property of another, acquired under color of a pretended judgment rendered in a State court, in which no service had been made upon the defendant. *Hinc illae lachrymæ!*

He intimates, most improperly, that the court has surrendered to the grasp of oligarchies, and suggests that if Congress, at its next session, would impeach the judges for usurpation of legislative power, remove them from office, and instruct the President to enforce the collection of the income tax, the Supreme Court of the United States would never thereafter presume to trench upon the exclusive power of Congress; and "thus," he says, "the government as created by our fathers would be restored with all of its faultless and harmonious proportions."

For the last century, he contends, we have been living under a government, not based upon the Federal Constitution, but under one created "by the plausible sophistries of John Marshall." He asserts that it is a pure assumption on the

part of the court to declare that the question as to whether a law is constitutional or not, is a judicial one, and that as the assumption is faulty, therefore the conclusion is unsound. He asserts further that the power claimed by the Supreme Court to nullify a law of Congress is entirely a self-made power. "In no decision ever rendered by it has it been able to point out the lettered warrant of the Constitution. It cannot be done, for it is not there." He sneers at Chancellor Kent for saying that courts of justice have a right, and are in duty bound, to bring every law to the test of the Constitution, and asserts that Kent did not quote his constitutional authority because he was not able to do so.

He further states that the claim of the Supreme Court to the right to nullify a law of Congress has no other warrant than its own assumption. By a garbled and partial reading of the proceedings in the Federal Convention which framed the Constitution, he contends that the framers never intended that the jurisdiction of the court should extend to cases arising under the Constitution, but that it was expressly meant to be limited to "cases of a judiciary nature;" and that "*at that time no common law court in all Christendom considered its jurisdiction broad enough to nullify the law of the legislature.*"

The slightest examination into the history of the origin of Article III. of the Constitution of the United States, which, in Section 2, expressly declares that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority," will convict the incautious writer of this article of blunder upon blunder.

The truth is that there were numerous instances of the exercise of judicial power to set aside acts of the legislature for lack of conformity to State Constitutions, or the principles of State Constitutions, which were present to the minds of the framers of the Constitution, several of whom had, as judges, participated in the exercise of this very power.

DAVID BREARLY, Chief Justice of New Jersey, and a member of the Federal Convention, had, in the case of *Holmes v. Walton* (referred to in *State v. Parkhurst*, 4 Halstead (N. J.), 444),

considered most gravely the exercise of such a judicial power. The case was brought by writ of *certiorari* before the Supreme Court of New Jersey on September 9, 1779, and was argued on constitutional grounds in November of the same year. The court held the matter under advisement for three terms, and on September 7, 1780, the judges, Brearly, Smith and Symmes, delivered their opinions *seriatim* for the plaintiff in *certiorari*. (See paper of Dr. Austin Scott, "Papers of the American Historical Association," Vol. 2, p. 86.) In anticipation of the final decision, the Legislature amended the statute in question. (Laws of New Jersey, original edition, 49, 4 Halstead, 444.)

In speaking of this decision, Gouverneur Morris wrote to the Pennsylvania Legislature in 1785: "In New Jersey the judges pronounced a law unconstitutional and void. Surely, no good citizen can wish to see the point decided in the tribunals of Pennsylvania. Such power in judges is dangerous, but unless it somewhere exists the time employed in framing a bill of rights and form of government was merely thrown away." (Sparks' "Life of Gouverneur Morris," Vol. 3, 438.)

The decision of *Holmes v. Walton* was followed, in 1796, by the case of *Taylor v. Radney*, 4 Halstead, appendix, 440, and again, in 1804, by *State v. Parkhurst*, 4 Halstead, 427.

In the meantime similar decisions had been reached in other States. The case of *Trevett v. Weeden* was decided in Rhode Island in 1786. (Pamphlet of J. B. Varnum, Providence, 1787.)

Prof. Cooley, in his work on "Constitutional Limitations," 4th ed., 196; Mr. Bryce, in his work on the "American Commonwealth," Vol. 1, p. 532; Prof. Fiske, in his book of "The Critical Period of American History," pp. 175, 176; Prof. McMaster, in his "History of the People of the United States," Vol. 1, 337, and Arnold, in his "History of Rhode Island," Vol. 2, p. 24, have fallen into the error of asserting that this was the first case in which the courts held an act of the legislature unconstitutional and void, on the ground of conflict with the fundamental law. That this is an error is clear from the fact that in Virginia, as early as 1782, the courts had

clearly asserted the power to declare a law void for lack of conformity to the Constitution.

George Mason, one of the members of the Federal Convention, and no stickler for Federal power, had, as far back as 1772, in the case of *Robbins v. Hardaway* (Jefferson's Rep. (Va.) 109), argued against the validity of an act providing for the descendants of Indian women as slaves, on the ground that the act was void as contrary to natural right and justice, and in violation of rights and duties which men owed to each other in a state of nature.

In May, 1778, the Legislature of Virginia passed an act of attainder against one Josiah Phillips, who had been devastating the State. During the year Phillips was captured, convicted and executed for highway robbery, the act of attainder being disregarded. Prof. Tucker (Tucker's Blackstone Appendix, 293) asserts that the court refused to recognize the act of attainder (see 4th Burk, Hist. of Va., 305, 306), and had directed the prisoner to be tried.

In 1776, a law had been passed in Virginia, taking from the executive the power of pardon in cases of treason, and under this act one Caton, having been convicted of treason, was pardoned by the House of Delegates without the concurrence of the Senate. The case reached the courts in 1782 (*Commonwealth v. Caton*, 4 Call (Va.), 1), when the Attorney-General moved for execution upon the prisoner. The latter pleaded the pardon of the House. Under the Constitution, as it then stood, the case was referred to the Court of Appeals, and it was there argued that the act of Assembly was contrary to the plain intent of the Constitution.

Mr. Edmund Randolph, then Attorney-General of Virginia, subsequently the first Attorney-General of the United States, and one of the leading members of the Federal Convention, argued that, whether the act was contrary to the spirit of the Constitution or not, the court was not authorized to declare it void. George Wythe, subsequently a framer of the Constitution, and in this very case sitting as a judge, declared: "If the whole legislature (an event to be deprecated) should attempt to overleap the bounds prescribed to them by the

people, I, in administering the public justice of the country, will meet the united efforts at my seat in this tribunal, and, pointing to the Constitution, will say to them: 'Here is the limit of your authority, and hither shall you go, but no further.'" Chancellor Blair, also a member of the Federal Convention, with the rest of the judges, was of the opinion that the court had power to declare any resolution of the legislature, or of either branch of it, to be unconstitutional and void.

Six years later, in 1788, the question was again raised in the very interesting "Case of the Judges" (4 Call, Va. 135), which grew out of an attempt by the legislature to impose additional and extra-judicial duties upon the court, and the judges found themselves obliged to decide "that the Constitution and the acts were in opposition; that they could not exist together, and that the former must control the operation of the latter."

These views were again declared in several later cases, and were directly enforced in 1793, in *Kemper v. Hawkins*, 2 Va. Cases, 20. See, also, *Turner v. Turner*, 4 Call, Va. 234; *Page v. Pendleton*, Wythe's Rep. 211.

In New York the same question was raised in the celebrated case of *Rutgers v. Waddington*, decided in 1784. There Alexander Hamilton, in a very able argument before the Mayor's Court of New York, contended that the Trespass Act, which authorized actions by owners against those who had occupied their houses under British orders during the British occupation, was unconstitutional. Hamilton argued that the law violated natural justice, and the decision was placed upon that ground. (*Rutgers v. Waddington*, Dawson's Pamphlet, 44; Hamilton's Works, edited by J. C. Hamilton, Vol. 5, 115, 116; Vol. 7, 197.)

In 1792 the Supreme Court of South Carolina held an act of the Colonial Legislature of 1712 void, as in contravention of common right and of Magna Charta: *Bowman v. Middleton*, 1 Bay, 252.

In North Carolina the power of the court to refuse to enforce a law, because unconstitutional, was elaborately

argued and considered in 1787: *Bayard v. Singleton*, 1 Martin (N. C.), 42.

The argument of Mr. Iredell, subsequently a Justice of the Supreme Court of the United States, is notable, and he expressed his views in plain terms in a correspondence held with Richard Dobbs Spaight, himself a member of the Federal Convention, and at the time of the receipt of the letter engaged in the very act of considering the question of Federal judicial power. (McRae's "Life and Letters of Iredell," Vol. 2, pp. 172-176. Compare Spaight's views, *Ibid*, pp. 167-169.)

It is beyond the reach of controversy, therefore, that when the Federal Convention met in 1787 for the purpose of framing a Constitution for the United States, the idea of controlling the legislature through the judiciary was familiar to its leading members. It had been asserted in New Jersey, Virginia, New York, Rhode Island and North Carolina. The members of the convention who had, either as counsel or as judges, considered such a question, were among the most prominent on the floor. There were: From Virginia, George Wythe, John Blair, Edmund Randolph and George Mason; from New Jersey, David Brearly; from New York, Alexander Hamilton; from North Carolina, Richard Dobbs Spaight, informed specifically by his correspondence with Iredell, of counsel in the case of *Bayard v. Singleton*.

(See a learned paper entitled "The Relation of the Judiciary to the Constitution," by William M. Meigs, of Philadelphia, *American Law Review* for March and April, 1885, pp. 177 to 203. See, also, a paper entitled "The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional," by Charles B. Elliott, Ph.D., *Political Science Quarterly*, Vol. 3, No. 2. Also, "The Origin and Scope of the American Doctrine of Constitutional Law," Vol. 7, *Harvard Law Review*, p. 129.)

As to the views of the members of the Federal Convention, our space does not permit us to go in detail into the language of the debates; but no careful student of Madison's Notes, or of the Journal of the Convention, can fail to reach the conclusion that it was generally admitted by the delegates that

the courts would have the power under the Constitution, without any express gift. Such a power was commented upon with approval in the convention by Gerry, Morris, James Wilson, Mason, and Luther Martin. It was opposed by Mercer, of Maryland, and Dickinson, of Delaware. A few references must suffice.

On June 4, 1787, Mr. Gerry, of Massachusetts, in speaking of the judiciary under the new Constitution, said: "They will have a sufficient check against encroachments on their own department by their exposition of the laws, which involves a power of deciding on their constitutionality. In some of the States the judges had actually set aside laws, as being against the Constitution. This was done, too, with general approbation:" § Elliott's Debates, 151.

The cases to which he referred were undoubtedly the seven cases in five States, all older than the Constitution of the United States, which have been presented in the foregoing review.

(On July 17th, Mr. Madison distinctly alluded, with approval, to the case of *Trevett v. Weeden*, saying: "In Rhode Island, the judges who refused to execute an unconstitutional law were displaced, and others substituted by the legislature, who would be the willing instruments of their masters:" § Elliott, p. 321.

On the same day, Mr. Gouverneur Morris, said: "A law that ought to be negatived will be set aside in the Judiciary Department, and if that security should fail, may be repealed by a national law."

Roger Sherman said: "Such a power involves a wrong principle, to wit: that a law of a State contrary to the articles of Union would, if not negatived, be valid and operative:" § Elliott, 321, 322.

The convention then rejected a legislative negative, and made a long leap forward, and adopted the language of the Constitution as it now stands in Article III., and adopted also the second paragraph of Article VI., which reads as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or

which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

On the 23d of August, an ineffectual effort was made by Mr. Charles Pinckney, of South Carolina, in favor of a legislative negative. Mr. Williamson, of North Carolina, thought it was unnecessary, "and having already been decided, a revival was a waste of time."

In a work entitled "An Essay on Judicial Power and Unconstitutional Legislation, Being a Commentary on Parts of the Constitution of the United States," Mr. Brinton Coxe, a most accomplished member of the Philadelphia Bar, a Democrat of the strictest standing, and a strict constructionist, contends most ingeniously that the framers of the Constitution actually intended by express enactment that the Supreme Court of the United States should be competent in all litigations before it to decide upon the question of the constitutionality of State laws and State Constitutions, and to hold the same to be void in so far as contrary to the Constitution and constitutional laws and treaties of the United States.

While we are not inclined to agree with Mr. Coxe that the judicial power to pass upon the question of the constitutionality of statutes is an *express* power, but prefer to adhere to the views of Marshall that it is clearly *implied*, yet it is most interesting to observe that so profound and scholarly a student of the Constitution, as was Mr. Coxe, so far from expressing himself in wild and revolutionary sentiments, suggestive of violence, and displaying the most startling ignorance of facts well known to all well-informed lawyers, attributed to the framers a larger measure of intention than was ever contended for by the most devout admirers of Marshall.

In the State Convention, the matter was discussed in Connecticut by Oliver Ellsworth, who called the judiciary "a constitutional check;" in North Carolina by Davies, in Pennsylvania by Wilson, and in Virginia by John Marshall, Edmund Randolph and Patrick Henry. The last named was a decided opponent of the Constitution, but he was an earnest

advocate of the independence of the judiciary. He believed that the judges should decide upon the constitutionality of a law, and feared that the National Judiciary, as organized, would not possess sufficient independence for this purpose. He used the following language: "The honorable gentleman did our judiciary honor in saying that they had firmness enough to counteract the legislature in some cases. Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your Federal Judiciary will act thus? Is that judiciary so well constituted, and so independent of the other branches, as our State Judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any:" 2 Elliott's Debates, 248.

In the *Federalist*, No. 78 and No. 80, the independence of the judiciary is elaborately discussed, and the existence of the power to pass upon questions of constitutionality is taken for granted. It is there commented upon, not as a mere possibility, but in order to remove any lingering objections there might be to such a practice. (See 19th *Am. Law Review*, p. 184.)

The Judiciary Act of 24th September, 1789, which was the work, almost exclusively, of Oliver Ellsworth, himself a member of the Federal Convention, and familiar with the views of his colleagues, provided for the review in the Supreme Court of the United States of judgments in the circuit courts and district courts upon writs of error, as well as upon a certificate of division of opinions, whether the causes originated in the circuit courts, or were removed there from the State courts, as well as for the review of cases where the validity of State statutes or any exercise of State authority should be drawn in question on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision should be in favor of their validity. This statute, which it is no exaggeration to term a veritable bond of union, is a clear legislative expression of the views of the First Congress under the Constitution—that the questions referred

to are judicial questions, and that the determination of them belongs, under the Constitution, to the Supreme Court.

The first case, in which the power of the Federal Courts to decline to enforce an act of Congress was asserted, illustrates the prevailing idea as to the position of the judiciary as well as the extreme modesty of the judges. The case is *Hayburn's*, 2 Dallas, 409. Congress had passed an act in March, 1792, providing for the settlement of claims of widows and orphans barred by certain limitations, and regulating claims for invalid pensions. The act directed the United States Circuit Courts to pass upon such claims, and made their decisions subject to review by the Secretary of War and by Congress. In the Circuit Court for the District of New York, Chief Justice JAY, Justice CUSHING, and District Judge DUANE, filed an order declining to execute the act as *Judges*, but declaring that "as the objects of this act are exceedingly benevolent, and do honor to the humanity and justice of Congress, and as the judges desire to manifest on all proper occasions, and in every proper manner, their highest respect for the national legislature, they will execute this act in the capacity of *Commissioners*." Justices WILSON and BLAIR, and District Judge PETERS, of the Circuit Court for Pennsylvania, absolutely refused to execute the act.

Justice IREDELL, and District Judge SITGREAVES, of the North Carolina Circuit, before any case came before them, joined in a letter to the President, expressing their doubt as to their power under the law to act even as commissioners.

The question reached the Supreme Court at the August Term, 1792, on an application for a mandamus to the District Court for the District of Pennsylvania. Attorney General Randolph entered into an elaborate discussion and analysis of the powers and duties of the court, and advised the execution of the law. Of his argument, he said: "The sum of my argument was an admission of the power [of the court] to refuse to execute, but the unfitness of this occasion." (See Conway's "Life of Edmund Randolph," 144-145.) No doubt existed in the minds of the judges, yet so great was the desire

to avoid a conflict that the motion was taken under advisement, and held until the statute was amended.

A subsequent case, however, was brought by amicable action against one Yale Todd to recover money paid him under a finding of Chief Justice JAY, and Judges CUSHING and LAW, acting as commissioners. After argument, judgment was rendered against the defendant. No opinion, stating the grounds of the decision, was filed, but the result was a determination that, as the power conferred by the act of 1792 was not judicial within the meaning of the Constitution, the act was unconstitutional. Chief Justice JAY and Justices CUSHING, WILSON, BLAIR and PATERSON were present at the decision, which seems to have been unanimous. (See note to *United States v. Ferreira*, 13 Howard, 40 and 52.)

The question was again raised, in 1798, in the case of *Caldwell v. Bull*, 3 Dallas, 386, and some doubts were expressed by Mr. Justice CHASE as to the jurisdiction of the court to determine that any law of a State Legislature contrary to the Constitution of the State was void, but he declined to express an opinion whether the Supreme Court could declare void an act of Congress contrary to the Federal Constitution.

A similar question was raised in the case of *Cooper v. Telfair*, 4 Dallas, 194, where Mr. Justice CHASE said: "It is, a general opinion, indeed it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided that the Supreme Court can declare an act of Congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point. I agree, however, in the general sentiment."

The learned judge had evidently forgotten the decision in the case of *United States v. Yale Todd*. The question was directly raised before Chief Justice MARSHALL in the famous case of *Marbury v. Madison*, decided in 1803, in which, as Chancellor KENT declares (1 Kent's Commentaries, 453), "the power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any State Legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration."

The language of Chief Justice MARSHALL is clear and conclusive. "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like any other act, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . . If an act of a legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as though it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted upon. It shall, however, receive more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. This is the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary acts of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law."

To characterize such reasoning as sophistry is childish. A school-boy might as well challenge a proposition of Euclid, or attempt to ridicule the *Principia* of Newton. Thomas Jefferson stormed at it in impotent rage, and since his time a few atrabilious critics have denounced it as mere *obiter dictum*; but, notwithstanding all assaults, it stands as an adamant piece of reasoning, and constitutes an invincible buttress of our nationality.

The power was never again seriously questioned in the

Federal courts for many years, until the question directly arose in *Cohens v. Virginia*, 6 Wheaton, 264. The reasoning of MARSHALL in that case has settled it forever. Nothing but a political earthquake can unsettle it. The pyramid of Cheops has stood for six thousand years unshaken by the barkings of the jackals at its base. The power has been constantly exercised, and the instances in which statutes of the United States have been held to be unconstitutional by the Supreme Court of the United States, stated in order of time, are as follows:

- 1792, *Hayburn's Case*, 2 Dallas, 409;
- 1794, *U. S. v. Yalc Todd*, 13 Howard, 52;
- 1803, *Marbury v. Madison*, 1 Cranch, 137;
- 1851, *U. S. v. Ferreira*, 13 Howard, 40;
- 1864, *Gordon v. U. S.*, 2 Wallace, 561;
- 1866, *Ex parte Garland*, 4 Wallace, 333;
- 1869, *Hepburn v. Griswold*, 8 Wallace, 603;
- 1869, *U. S. v. Dellitt*, 9 Wallace, 41;
- 1869, *The Justices v. Murray*, 9 Wallace, 274;
- 1870, *Collector v. Day*, 11 Wallace, 113;
- 1871, *United States v. Klein*, 13 Wallace, 128;
- 1872, *U. S. v. R. R. Co.*, 17 Wallace, 322;
- 1875, *U. S. v. Reese*, 92 U. S. 214;
- 1877, *U. S. v. Fox*, 95 U. S. 670;
- 1879, *Trademark Cases*, 100 U. S. 82;
- 1879, *Colburn v. Thompson*, 103 U. S. 168;
- 1882, *U. S. v. Harris*, 106 U. S. 629;
- 1883, *Civil Rights Cases*, 109 U. S. 3;
- 1885, *Boyd v. U. S.*, 116 U. S. 616;
- 1887, *Callan v. Wilson*, 127 U. S. 540, and in
- 1895, *Income Tax Cases*, not yet reported.

Thus, from 1790 to 1895, inclusive, the Supreme Court has exercised the power to declare acts of Congress unconstitutional, because of conflict with the Constitution, in twenty-one separate instances. During the same period it exercised the same power without challenge or remark, as to jurisdiction, in relation to the statutes of the States and Territories in one hundred and eighty-two instances: Seven cases being from Alabama, four from Arkansas, seven from California, one from

Delaware, one from the District of Columbia, one from Florida, eight from Georgia, six from Illinois, three from Indiana, four from Iowa, three from Kansas, four from Kentucky, nineteen from Louisiana, one from Maine, nine from Maryland, two from Massachusetts, two from Michigan, three from Minnesota, one from Mississippi, eleven from Missouri, one from Montana, one from Nevada, one from New Hampshire, one from New Jersey, sixteen from New York, two from North Carolina, nine from Ohio, two from Oregon, thirteen from Pennsylvania, four from North Carolina, eight from Tennessee, five from Texas, one from Utah, one from Vermont, thirteen from Virginia, three from West Virginia, and three from Wisconsin.

A partial list of these cases (complete, however, up to 1888), is to be found in the Centennial Appendix to Volume 131 of the United States Reports.

See, also, Appendix No. 2 to the Annual Address of J. H. Benton, Jr., of Boston, Mass., printed in the proceedings of the Southern New Hampshire Bar Association, 1894.

After these numerous and repeated exercises of power, all of which, even the earliest, rest upon the soundest and broadest foundations, it is preposterous to speak of the decision of the Supreme Court in the Income Tax cases as an "assumption of authority."

Whether the act itself was in terms just or unjust, wise or foolish, does not touch the question. If Congress does not possess the power to pass such an act under the Constitution, there is no law of which the features can be discussed.

To attempt to reverse the decision of the court on the ground of the supposed justice of the act reviewed, or to vindicate the act upon the false and untenable assertion that the court has usurped authority, is to argue in a vicious circle. It indicates an entire lack of comprehension as to the distinction existing between legislative and judicial power.

He who railed against the government, and preached sedition was, in former days, after conviction, either hanged or sent to Botany Bay. As this is an age of milder manners, it may be sufficient to suggest to all those who are disappointed in

the effort to incite the people to pull down about their own ears the fabric of the government, in the effort to produce a condition of "harmony," that they are at liberty to secure a continent, or if that be too small, a separate hemisphere of their own.

DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

EDITOR-IN-CHIEF,

HON. GEORGE M. DALLAS.

Assisted by

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MELVIN ET AL. V. ALDRIDGE ET AL.¹ COURT OF APPEALS OF MARYLAND. June 18, 1895.

In an action for an accounting, between owners of property and their agents for its sale, a personal indebtedness of one of the owners to one of the agents cannot be considered, "that," in the words of FOWLER, J., "being a transaction between them and him, in which the other defendants are in no wise interested."

SET-OFF BY AGENT AGAINST PRINCIPAL.

When, in the course of the agency, money belonging to the principal has come into the agent's hands, and the principal makes a demand upon him for an accounting, or return of the money, under what circumstances, if ever, can the agent set up, in reply, that a debt is due him from the principal?

It is said that "the right of set-off, recoupment and counterclaim, in actions at law between principal and agent, is governed ordinarily by the same rules that apply in other cases. This right, however, may be waived by contract, express or implied, and it cannot be insisted upon where its enforcement would result in a violation of the agent's duty to his principal: " *Mechan on Agency*. § 535.

¹ Reported, 32 Atl. Rep. 389.

The general right of agents to retain, out of money in their hands, compensation for their services in the same transaction, is unquestionable; and a discussion of claims by way of commissions, or otherwise, and their enforcement through the medium of liens, is beyond the present purpose.

The agent's right to reimbursement for expenses or losses necessarily incurred in and about the transactions of the agency seems equally well settled: *Story on Agency*, Cap. 13; *Wharton on Agency*, Cap. 5; *Waterman on Set-off*, Cap. 3.

As to the right of an agent to set-off, in an action by his principal, a debt arising prior to the inception of the relation, or during its subsistence, but independently thereof, there is some room for discussion; but the law appears to be reducible to the following propositions:

1. When money is entrusted to an agent directly by the principal, or is collected or received for the principal, and there is an antecedent appropriation of the funds to specific purposes, by his express direction, it is held that the agent has no more right to divert the funds from their destination by appropriating them to the payment of his own debt, than he has to divert them for any other purpose.

"The receipt of money for a defined use amounts to an agreement, on the part of the person receiving it, that he will not apply it to any other, and, of course, not to his own, by pleading a set-off:" *Smuller v. Union Canal Co.*, 37 Pa. 68 (1860); See, also, *Ardesco Oil Co. v. North American Oil Co.*, 66 Pa. 375.

The fiduciary relationship, usually said to exist, is, in this instance, made concrete, and the agent is a trustee upon a special trust, actually, if not technically.

In *Tagg v. Bowman*, 108 Penna. 273 (1883), which is, perhaps, the leading case, an agent was authorized to make certain collections, and apply the money, first, to the payment of debts due to third persons, and then to a debt due to himself, but instead, applied the whole amount to his own debt. In an action by the principal for the amount collected, the agent's claim to set-off his debt was disallowed, the court saying that the money, as collected, belonged to the principal,

and as it came into the agent's hands was impressed with a trust in favor of the principal, which required its application to the objects specified, in their order. So long as there was anything due upon the preferred objects, the agent had no right to appropriate any of the money to the payment of his own claim, for such appropriation would be a manifest breach of the trust on which it was received.

Where a State government deposited money in a bank, giving notice that the fund was to be devoted to a specific purpose, viz.: the building of a canal, it was held that the bank could not set-off, as a defence to the demand upon coupons payable out of said fund, a balance due by the State, for an overdraft of its general account: *Bank of the United States v. Mac-Ilister*, 9 Penna. 475 (1848). The court said: "As long as the deposit is permitted to remain in their hands, they are the agents of the holders of the coupons to the amount of the fund set apart for their payment. It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use:" See, also, *Wiston v. Barker*, 12 Johns. 276; *Dias v. Brundell's Est.*, 24 Wend. 9. But, see, *Pendergast v. Greenfield*, 40 Hun. 494.

In a case where the collector of a canal company received sums as tolls, which it was his express official duty to apply towards the payment of a certain claim against the company, it was held that he could not set-off in a suit by the company for an accounting, a note held by him against the company: *Smuller v. Union Canal Co.*, 37 Penna. 68 (1860). The money being appropriated before it came into his hands, he was constituted the agent of the company for the express purpose of paying it over to the specified persons, and could not appropriate any part of it to his own debt.

The same conclusion was reached in a case where a corporation placed money in the hands of its general manager "for safe-keeping, and to be disbursed in its business:" *First National Bank of Detroit v. Barnum Wire and Iron Works*, 58 Mich. 124 (1885). See, also, *Peters v. Nashville Savings Bank*, 86 Tenn. 224.

The consideration of these last cases leads to the next proposition.

II. The receipt of money *in an official capacity*—*e. g.*—as treasurer of a corporation—would seem to be equivalent to an antecedent express appropriation to the purposes of the office.

Thus, where the treasurer of a church was sued by the church for funds in his hands, it was held that he could not set-off a debt due him in his individual capacity, *SHARSWOOD, J.*, saying: "He received the funds to hold at the order of the corporation, as their officer, and without such order he cannot pay or appropriate them either to himself or others. There is fairly to be implied, from the relation he sustains, an undertaking not to plead a set-off, but to account and pay over whatever money came to his hands in that character:" *Russell v. First Presbyterian Church*, 65 Penna. 9 (1870).

In *Middleton and Harrisburg Turnpike Road Co. v. Watson*, 1 Rawle, 330 (1829), the manager and agent of the company had made collections from delinquent subscribers, and, in a suit against his administratrix by the company to recover this money, the defence relied on was that the money had been expended in the purchase of the debts of the company. This was overruled, the court saying: "The relation of principal and agent is well settled; as long as the agent acts within the scope of his authority, and no longer, he is protected. It was the duty of Watson to collect and pay over the funds as they came to his hands. It was for the company to direct the application of the money, when in the treasury, or under their control, to whatever purposes they might suppose most beneficial to the corporation. This they have been prevented from doing, by an assumption of power by their agent, and a misapplication of the funds of the company. . . . A principal may give special authority to his agent to settle and liquidate his debts, and this is frequently done; but previous to the introduction of such a defence, to a suit brought for money had and received as agent, the special authority should be shown."

The treasurer of a borough was not allowed to set-off, in the settlement of his accounts, a bond held by him for money

loaned to the borough: *Todd v. Borough of Patterson*, 55 Pa. 496 (1867). It was held that the subject of the settlement must be his official receipts and disbursements, and that he was chargeable with money coming into the treasury by way of loan, whether from himself or others. "As treasurer, he could not know what reason the council might have for refusing payment; and he could not, by his own act, determine any defence the council might have, in his own favor, as the holder of the bond. The sum of the matter is, that, as an officer, he could not obtain a credit for the disbursement to the bond held by himself as an unofficial person; in short, without an order of council. He could neither deprive the borough of its defence, nor speculate in his official capacity upon the claim preferred against it. . . . As treasurer, the case was rightly decided against him. As a creditor of the borough, he can proceed as any other creditors may do, if the debts be valid." See, also, *Pravitt v. Marsh*, 1 Stewart & Pater, 17; *Harp v. Howard*, 3 Ala. 284; *Wilson v. Lewistown*, 1 Watts & Serg. 428; *Com. v. Rodes*, 5 Mont. 318; *Waterman on Set-off*, § 190.

III. Where, then, the relationship is such that the funds are held upon a trust for specific purposes, the rule seems to be well settled.

It is hornbook law that a trustee cannot, on the subject of the trust, act for his own benefit, to his principal's detriment. See *Furkist v. Alexander*, 1 Johns. Ch. 394; *Story on Agency*, Cap. IV., etc., etc.

Furthermore, it is a fundamental principle of the doctrine of set-off, that the debts as to which the right is claimed must be due in the same capacity.

Against a claim for a debt due by a trustee in his fiduciary capacity, he cannot set-off a debt due to him individually: *Tagg v. Bowman*, 99 Pa. 376 (1882); *First Natl. Bank of Detroit v. Barnum Wire Works*, 58 Mich. 124 (1885); *Scammon v. Kimball*, 92 U. S. 362; *Daniel v. Wall*, 4 S. E. 271 (Ga. 1888); *Shearman v. Morris*, 24 Atl. 313 (Pa. 1892); *Sticking v. Clement*, 7 Gray 170; *Richbourg v. Richbourg*, 1 Harp. Eq. (S. Car.) 168; *Bradshaw's Appeal*, 3 Grant, 109, and other cases too numerous for citation.

But, although the relation of principal and agent is, in general language, said to be a fiduciary one, yet it is not invariably so, in all senses. In *Spalding v. Mattingly et al.*, 1 S. W. 488 (Ky. 1886) it was said: "The equitable rule which prevents an agent from dealing with his principal's property for his own benefit, inconsistent with the interest of the principal, applies only to agents who are relied upon for counsel and direction, and whose employment is rather a trust than a service, or both, and not to those who are employed merely as instruments in the performance of an appointed service."

IV. As to the case where an agent makes a collection, sells goods, or receives money on deposit from the principal, and there it neither an express appropriation of the funds, nor an official position and duty, the authorities are not in harmony, and no general rule can be laid down.

Agents, as to this subject, may be divided into three classes: (1) Attorneys, or other agents, who make collections for their principals; (2) Bankers, or others, receiving money on general deposit; (3) Factors and brokers, who sell goods of their principals and receive the price.

The general rule applies to all these classes, that "the agent is bound to account to his principal for all money and property which may come into his hands during and by virtue of the agency:" *Mechem*, § 522.

And "an agent authorized to collect and transmit funds to his principal, has no implied authority to enter into any contract concerning the money in his hands:" *Mechem*, § 384.

Does this general duty to account and transmit amount to such a destination of the money as to prevent the agent from setting-off his individual debt?

The only authorities which are to be found, are not conclusive of the question.

On the one hand, it has been held, in Indiana, that, where an attorney was sued for money collected, he might set-off a note held by him, executed by his client: *Noble v. Leary*, 37 Ind. 186 (1871). It having been argued that, on account of the existence of the relation of principal and agent, the attorney could not purchase the note and set it off, the court

said: "The appellee deduces this principle from the rule that the agent cannot place himself in a position adverse, or in opposition to the interest of the principal. We have not found any case exactly like this. Recurring, however, to the works on the subject of agency, we find the rule to be this, that, in matters touching the agency, agents cannot act so as to bind their principals, where they have an adverse interest: *Story*, § 310. The purchase of the note in this case, was, so far as we can see, in no way connected with the agency. We see no reason why, if the defendant had sued on the note which he purchased, [the client] could not have met the claim by an answer of set-off, on account of the liability of the defendant to him for the money collected. Nor can we, on the other hand, see any legal reason why, when [the client] sues the defendant for the money collected, he cannot use the note as a set-off, to that extent, against the demand for the money. . . . It is not claimed that there is anything in the nature of this particular agency which requires it to be distinguished from any other agency; but it is insisted that the rule contended for applies to all agencies where it is the duty of the agent to account for money received by him for his principal. Could it be successfully asserted that the defendant could not have sued on the note, even while he yet held the money collected for him in his hands? We think not."

Whether the conclusion here reached be correct or not, the reasoning is obviously bad. There is a confusion of thought, in arguing as though the agent's alleged breach of duty lay in his purchase of the note, and not in his endeavor to use it in a particular way. There is a *petitio principii* in assuming that the client would have had the right to set-off the claim for money collected, in a suit on the note. And, finally, there is an error of law in the proposition that, because the holder of the note would have had a right to bring suit upon it, he must, therefore have had the right to set it off.

On the other side is the Pennsylvania case of *Simpson v. Pinkerton et al.*, 10 W. N. C. 423 (1881), where an attorney who had collected a claim for damages to real property, was not allowed to set-off against a claim for this amount, a sum

due him by the owner of the property on bonds and coupons secured by a mortgage on the same property.

The opinion was *per curiam*, the court saying only: "We think it is very clear that an attorney-at-law, or in fact, employed to collect a claim, when he has received or recovered the money, has no right to set-off an antecedent debt or claim in his own right against his constituent. He ought to show in such case that his constituent expressly agreed that he might retain his demand out of the money." This certainly seems more in harmony with the whole theory of the subject.

In the case of *Reed v. Penrose's Executrix*, 36 Pa. 214 (1860), funds of a corporation had been deposited by the treasurer with a banker, who was also the president of the corporation, under an agreement to pay interest and to hold the money subject to call. On attachment-execution against the company, the banker was made garnishee, and sought to set-off bonds of the company held by him. The court below held that this could not be allowed, and the judgment was affirmed on other grounds, without any opinion of the majority of the court on this point.

In the subsequent case of *Fox et al. v. Reed*, 3 Grant, 81, involving substantially the same set of facts, the Supreme Court held that, as against third parties, the set-off was rightly refused the court saying: "It would be a breach of the confidence reposed in him as depository, as president, and as co-corporator, for him to take such an advantage of his position."

Yet the opinion of STRONG, J., in the former case, remains of interest and value. He maintained that the set-off should have been permitted, saying: "This right of defalcation is a legal right, secured to a defendant in all cases where he holds demands against a plaintiff, due in the same right, and due at the time when the suit was commenced against him. I agree that he may, by express contract, preclude himself from pleading a set-off. Such a contract, founded on consideration, would bind him. . . . And I think a defendant may also debar himself from using a set-off by a contract not express. Thus, if he receives money delivered to him for his application to a particular use, his receipt may amount to an agreement

said: "The appellee deduces this principle from the fact that the agent cannot place himself in a position of opposition to the interest of the principal. We find no case exactly like this. Recurring, however, to the subject of agency, we find the rule to be that in matters touching the agency, agents cannot act against their principals, where they have an adverse interest. § 210. The purchase of the note in this case, was, so we see, in no way connected with the agency. We say, why, if the defendant had sued on the note which he purchased, [the client] could not have met the claim by a set-off, on account of the liability of the defendant for the money collected. Nor can we, on the other hand, find any legal reason why, when [the client] sues the defendant for the money collected, he cannot use the note as a set-off, to that extent, against the demand for the money. It is not claimed that there is anything in the nature of this particular agency which requires it to be distinguished from other agencies; but it is insisted that the rule applies to all agencies where it is the duty of the agent to account for money received by him for his principal. If it be successfully asserted that the defendant could not sue on the note, even while he yet held the money for him in his hands? We think not."

Whether the conclusion here reached be correct, the reasoning is obviously bad. There is a confusion in arguing as though the agent's alleged breach was in his purchase of the note, and not in his endeavor to collect it in a particular way. There is a *petitio principii* in that the client would have had the right to set-off the money collected, in a suit on the note. And, it is an error of law in the proposition that, because the principal of the note would have had a right to bring suit on it, he must, therefore have had the right to set it off.

On the other side is the Pennsylvania case of *Pinkerton et al.*, 10 W. N. C. 423 (1881), where it was held that an agent who had collected a claim for damages to real property, was not allowed to set-off against a claim for this amount.

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not to apply it to any other use, and of course not to his own, by pleading a set-off. The case of *Bank v. Macalester* [supra], goes no further than this. But, while I admit that a defendant may bar himself from using a set-off by contract, either express or implied, I deny that he can be deprived of his legal right to defalcate, by anything less than a contract. In the present case there is no allegation of any express contract not to plead a set-off. The only question, therefore, is whether one is to be inferred from the transactions between the debtor and garnishee. It is hardly necessary to say that it is not to be implied from the intention or expectation of the creditor at the time when the debt due him was created, nor from the inconvenience to which he may be subjected if the set-off be allowed. . . . No doubt the company had no expectation that the president would retain the funds deposited with him under any claim of set-off. No doubt his having done so would have embarrassed them, but they exacted no agreement from him not to plead it; they relied upon what was at most an honorary obligation. He was the banker of the company and received the money in the ordinary course of business as a banker. But is a banker bound to answer the checks of a depositor when he holds the depositor's notes or bonds part due? The contrary has been held again and again: *Davis v. Bowsher*, 5 T. R. 492; *Rogerson v. Ladbroke*, 1 Bing. 94; *Bank v. Armstrong*, 4 Dev. 524; *Albany Commercial Bank v. Hughes*, 17 Wend. 94.

Nor is there anything in the receipts which R. signed, from which can be inferred a promise not to defalcate. Most of them are mere acknowledgments, that sums of money, being canal funds, had come to his hands, "to be accounted for when required." Is that anything more than a promise to pay on demand? One recites that the sum received was the amount appropriated by said company for rebuilding [certain] aqueducts, upon which he was to pay interest until called for. This is a mere description of the ownership of the fund, and an identification of it. It was not itself an appropriation, not a receipt by the banker for the purpose designated, as was the case in *Bank v. Macalester*. Reed as banker had nothing to

do with its appropriation, assumed no agency for any such purpose. His only engagement was to pay the company. Of course, then, there having been no stipulated use, he was free to use the set-off. . . . His presidency did not prevent his making any contract with the company, and he did contract as banker. . . . I have failed to discover any evidence of a contract, express or implied, that the garnishee would not plead the statute of defalcation, and I cannot but think that a denial to him of the right of set-off is enforcing what is only an honorary obligation in a court of law. . . . I repeat that set-off is a legal right, and, though it may be waived, no one can be compelled to waive it, except by the force of his own contract. And this contract must be positive and unequivocal. . . . Of course, I am not speaking of cases of fraud, nor of those peculiar and technical trusts cognizable only in a court of equity, in opposition to which, set-off can never avail. This is no such case."

It is enough to say that the rule stated, as to bankers, is undoubtedly correct. The subject is not one for discussion in this place.

The class of agents embracing factors and brokers, who have custody of the property of the principal, presents some interesting questions.

The general rule seems to be, that "factors, agents and brokers acting as such, and having the custody of money or property belonging to a principal, act in a fiduciary capacity, and are for that reason held to a strict liability:" *Edwards on Bailments*, § 184, and cases.

It may be well to premise, that, whatever rights of set-off such agents may have, they cannot be enforced through the medium of liens. The factor's or broker's lien "does not extend to other independent debts contracted before and without reference to the agency:" *Story on Agency*, § 376; *Wharton on Agency*, §§ 768, 818; *Mechern on Agency*, § 1032, and cases cited; *Drinkwater v. Goodwin*, *Comp.* 251; *Houghton v. Mathews*, 3 Bos. & P. 485; *Ex parte Shank*, 1 Ark. 234; *Walker v. Buck*, 6 T. R. 258; *Nudd v. Burrows*, 91 U. S. 426; *Stevens v. Robins*, 12 Mass. 182.

"Though a factor may sell and bind his principal, he cannot pledge the goods as a security for his own debt:" 2 Kent Com. 625, and cases cited; *Mechem*, § 324, and cases cited.

"The factor cannot confer title, even upon a *bona fide* holder, by turning out the principal's goods in payment of his own debts, even though the accounts between the principal and the factor may be in the factor's favor; *Mechem*, § 996; *Benny v. Rhodes*, 18 Md. 147; *Holton v. Smith*, 7 N. H. 446; *Warner v. Martin*, 11 How. (U. S.) 209.

In *Kir et al. v. Flint*, 8 Taunt. 21 (1817), A, previous to bankruptcy, deposited a bill of exchange with B, not upon his general account, but for the specific purpose of raising money thereon. In trover by his assignees, they having tendered the amount advanced, it was held that B could not set-off the amount due him on the general balance.

DALLAS, J., held that this was not a case of "mutual credits" within the bankrupt law (5 Geo. 2, c. 30), saying: "Mutual credit must mean mutual trust; and this attempt of the defendant appears to me a gross breach of trust. The bill of exchange which forms the subject of the present action was entrusted to the defendant for a specific purpose, with an express understanding that it was not to go into the general account." See, also, *Buchanan et al. v. Findlay et al.*, 9 B. & C. 738 (1829), and cases there cited, under the same statute.

The case of *McGillivray v. Simpson*, unreported, but given in a note to 9 B. & C. 746, was an action against a broker for the proceeds of some timber sold by him on account of bankrupts. It appeared that the timber was placed in his hands for sale, upon his promising to pay over the proceeds, deducting his commissions. The defendant sold the timber, and then claimed to retain out of it a debt due him from the bankrupts; and it was held that he might do so. This case is cited with approval by Lord TENNEN in *Buchanan v. Findlay*, *supra*, and seems to be the only decision extant on the precise point.

It was, to be sure, a decision under the express provisions of a statute, but these were simply, that, when there had been mutual credits or mutual debts between the bankrupt and any other person, one debt might be set-off against the other:

§ Geo. 2, c. 30, § 28. And "the same mutuality of credit is required in the case of setting off credits under the bankruptcy laws, as is required in order that debts may be set-off under the ordinary statutes of set-off": 22 *American and English Cyclopædia*, 265, *Tit. Set-off*; 8 *Bac. Abr.* 651; *Staniforth v. Fellows*, 1 *Marsh.* 184.

In a recent case, where the plaintiff had entrusted horses to the defendant to sell at auction, it was held, in an action for their price, that the defendant could not set-off damages caused by one of the horses running away and injuring property of a third person: *Oberholtzer v. Heist*, 16 *Atl.* 804 (*Pa.* 1889).

V. In jurisdictions where the right of set-off is confined to items growing out of the contract or transaction on which suit is brought, the agent's right will of course be limited.

Thus, where the defendant, having acted as agent for the plaintiff, in the sale of certain goods, gave his note for the balance due upon a settlement of their accounts, in action on the note, he was held entitled to set-off against it only the amount due him by plaintiff as commissions on sales made by him, and not commissions for other acts, such as collections: *Jackson v. Tate*, 2 *South.* 97 (*Ala.* 1887). See, also, *Clark's Grove Guano Co. v. Appling*, 33 *W. Va.* 470 (1890).

SAMUEL DREHER MATLACK.

December, 1895.

BOOKS RECEIVED.

[All legal works received before the first of the month will be reviewed in the issue of the month following. Books should be sent to W. S. Mills, Esq., 736 Drexel Building, Philadelphia, Pa.]

TREATISES, TEXT-BOOKS, ETC.

- THE PRINCIPLES OF EQUITY AND EQUITY PLEADING.** By ELIAS MEWWIN. Edited by H. C. MEWWIN. Boston and New York: Houghton, Mifflin & Co. 1895.
- HANDBOOK OF THE LAW OF TORTS.** By EDWIN A. JAGGARD. (Hornbook Series, No. 10.) Two volumes. St. Paul: West Publishing Co. 1895.
- RES JUDICATA. A TREATISE ON THE LAW OF FORMER ADJUDICATION.** By JOHN M. VANFLEET. Two volumes. Indianapolis and Kansas City: The Bowen-Merrill Co. 1895.
- A TREATISE ON LAND TITLES IN THE UNITED STATES.** By LEWIS N. DEXMITH. Two volumes. St. Paul: West Publishing Co. 1895.
- COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS.** By SEYMOUR D. THOMPSON, LL.D. In Six Volumes. Vols. I-IV. San Francisco: Bancroft-Whitney Co. 1895.
- INTRODUCTION TO AMERICAN LAW.** Designed as a First Book for Students. By TIMOTHY WALKER. Tenth Edition. Revised by CLEMENT RATES. Boston: Little, Brown & Co. 1895.
- THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY.** By GEORGE S. BOUTWELL. Boston: D. C. Heath & Co. 1895.
- HANDBOOK OF INTERNATIONAL LAW.** By Captain EDWIN F. GLENN, Acting Judge Advocate U. S. Army. St. Paul: West Publishing Co. 1895.
- THE LAW OF NATURALIZATION IN THE UNITED STATES AND OF OTHER COUNTRIES.** By PRENTISS WEBSTER, A.M. Boston: Little, Brown & Co. 1895.
- THE LAW RELATING TO ELECTRICITY.** By SIMON G. CROSSWELL. Boston: Little, Brown & Co. 1895.
- THE RELIGION OF THE REPUBLIC AND LAWS OF RELIGIOUS CORPORATIONS.** By Dr. A. J. KYNETT. Cincinnati: Western Methodist Book Concern. 1895.
- ANARCHY OR GOVERNMENT? AN INQUIRY IN FUNDAMENTAL POLITICS.** By WM. MACKINTYRE SALTER. New York and Boston: Thomas Y. Crowell & Co. 1895.

SELECTED CASES, ETC.

- THE AMERICAN DIGEST (Annual), 1895. St. Paul: West Publishing Co. 1895.
- AMERICAN RAILROAD AND CORPORATION REPORTS, ANNOTATED. Vol. X. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.
- CASES ON TORTS. Edited by MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1895.
- ILLUSTRATIVE CASES UPON EQUITY JURISPRUDENCE. By NORMAN FETTER. St. Paul: West Publishing Co. 1895.
- THE ANNUAL ON THE LAW OF REAL PROPERTY. Edited by TILGHMAN E. and EMERSON E. BALLARD. Vol. 3. Crawfordsville, Ind.: The Ballard Publishing Co. 1894.
- AMERICAN RAILROAD AND CORPORATION REPORTS, ANNOTATED. Vol. XI. Edited by JOHN LEWIS. Chicago: E. B. Myers & Co. 1895.

• To be reviewed when completed.

BOOK REVIEWS.

LAW OF NATURALIZATION IN THE UNITED STATES OF AMERICA AND OF OTHER COUNTRIES. By PRENTISS WEBSTER, A.M.
Boston: Little, Brown & Co. 1895.

The subject with which the author deals in this volume, though of great importance from any point of view, concerns the politician and the sociologist more closely than the lawyer; and yet, considering the fact that citizenship can be acquired by a foreign-born resident only through naturalization, and that the acquisition of citizenship confers on such a resident many rights, and subjects him to a number of responsibilities to which he was a stranger before, it will readily be perceived that the work may be of great value to the lawyer also. The book is a companion volume to the author's former treatise on the law of citizenship, supplementing and to some extent paralleling the latter; and the two together give a very clear synopsis of the acquisition, rights and responsibilities of that most important of all human relations.

The arrangement of the subject-matter is somewhat different from that of ordinary text-books, since it is divided into neither chapters nor numbered sections, but is simply arranged according to topics. This is, however, perhaps the best system that could have been devised for this subject. Starting out with some general observations on the importance of the question of naturalization, and the abuses to which it is subject, the author goes on to state who may or may not be naturalized; to discuss the right of expatriation; the declaration of intent; the effect of naturalization; the laws relating to naturalization in different countries, and treaties on the subject with foreign nations. Incidentally he touches on most, if not all, of the questions that may arise, including the naturalization of women (which will doubtless occur as a new idea to many, but which, with the extension of female suffrage, will become of importance from a political, as well as a legal, standpoint), the effect of the naturalization of the parent on the political status of an illegitimate child, the effect of marriage of the mother on her children, and the like.

The author's statement of principles are good, and his citation in the main accurate; but there are one or two points that might have been more carefully presented. For instance, he quotes *Look Tin Sing's Case*, 10 Sawyer, (U. S.) 353, as authority for the doctrine that, when the child of a former citizen is born out of the country, after his father has renounced his allegiance to the United States, the child is not a citizen. This is unquestionably true; but it is only stated by the judge *arguendo*; and the main point decided in that case, that a person born in the United States of foreign parents residing therein, and not engaged in any diplomatic or official capacity under their own sovereign, is a citizen of the United States even if the parents are Chinese, and consequently incapable of naturalization, (*per the Sand-Lots*). One may, perhaps, also be permitted to take exception to the grammatical perfection of the title; but blemishes such as these are not sufficiently serious to impair to any appreciable degree the value of the work.

ARDEMUS STEWART.

THE LAW APPLICABLE TO STRIKES. By JACOB M. MOSES, of the Baltimore Bar. Baltimore: King Bros. 1895.

This modest but valuable little pamphlet was the prize thesis of the University of Maryland for 1895; and a perusal of it will show that it well deserved that distinction. The subject is one that is rapidly becoming of prime importance, legally as well as socially, in view of the fact that it has led to some of the most impressive and far reaching developments of recent years in the history of jurisprudence, and has been treated by the author in a remarkably able manner; and that his brochure is the first attempt to deal with its subject as a special branch of the law. It possesses, therefore, every element of success.

It is very gratifying to note that Mr. Moses, though presumably a young man, has not suffered himself to be led astray by any chimerical theory as to the inviolability of personal liberty, such as would hold a state of anarchy perfectly proper and beyond improvement by legal proceedings, if not forbidden by positive law, and such as hold equity

powerless to prevent any band of conspirators from destroying the property rights of other theories with which the periodicals have been full for nearly a year past; but vigorously upholds the exercise of that jurisdiction as it was manifested during the Debs insurrection. His criticism of the objections urged against it will repay careful study. It might have been equally valuable if, instead of mildly passing over Judge GAYNOR's absurd mandamus to the street railroads of Brooklyn to run their cars, he had criticised that illegal proceeding with equal acuteness. But as it is, the pamphlet is in every way deserving of attention, and will doubtless prove of great value, as an aid to the decision of the many similar questions that will surely arise hereafter. Q.

CURRENT EVENTS

OF GENERAL LEGAL INTEREST.

Many articles have appeared recently in current magazines and newspapers relating to the question whether the time has come at which the United States ought to recognize those engaged in the Cuban Revolution as having the rights of belligerents. There is a distinction not generally understood between the recognition of a revolted community as having belligerent rights, and the according to such community recognition as an independent State. The right of a body of subjects rebelling against the lawfully constituted government to which they owe allegiance to claim recognition as belligerents, arises very much sooner than their right to recognition as a separate and independent State. In the latter case it has never been customary to recognize insurgents as a separate State until the time has arrived when they have practically overcome the opposition of the parent State, and have constituted themselves into a separate and distinct nation with an effective government firmly established. For example, Great Britain did not recognize the Spanish Republics of South America as independent States until they had driven out the Spaniards from all parts of South America, except an island on the coast of Chili and a small section of upper Peru. On

Should the
Cuban
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be Recognized
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the other hand, Great Britain granted to the Confederate States of America recognition as belligerents immediately after President Lincoln issued his proclamation blockading the ports of the Southern States.

It is not claimed by any one that the time has come when the Cuban insurgents have established a right to recognition as an independent State, but there is at least room for difference of opinion as to whether our Congress should not recognize their rights as belligerents. Strong reasons exist for giving such recognition to revolutionists who can show as good a *prima facie* case for recognition as that of the native Cubans who are now struggling for independence. Apart from the strong sympathy which citizens of this country naturally feel for those who are struggling elsewhere to free themselves from foreign control and to establish a government of a republican character, there is the additional argument that this revolution has assumed such proportions, and has spread over such an extent of territory, as to make it barbarous for the Spaniards to treat these people simply as traitors and deserving punishment as such. It is considered by many people that recognition should not be given so long as the Spanish troops retain possession of the leading cities of Cuba. This argument, however, is more than over-balanced by the fact that at least two-thirds of the total area of the island is in possession of the insurgents, and that the revolution has been continuously maintained for so long a period. It would seem, therefore, that the Cuban revolutionists were entitled to claim the same rights and privileges as those which a recognized State possesses for the purposes of warlike operations. It would seem, also, that the United States is entitled to the advantage which such recognition would afford to it in the way of compelling the Spanish government to treat this country as a neutral between two legitimate combatants. To grant such recognition at the present time would, at any rate, be no more rapid than was the action of Great Britain in according to the Southern States recognition as belligerents within the first month after the commencement of the Civil War.

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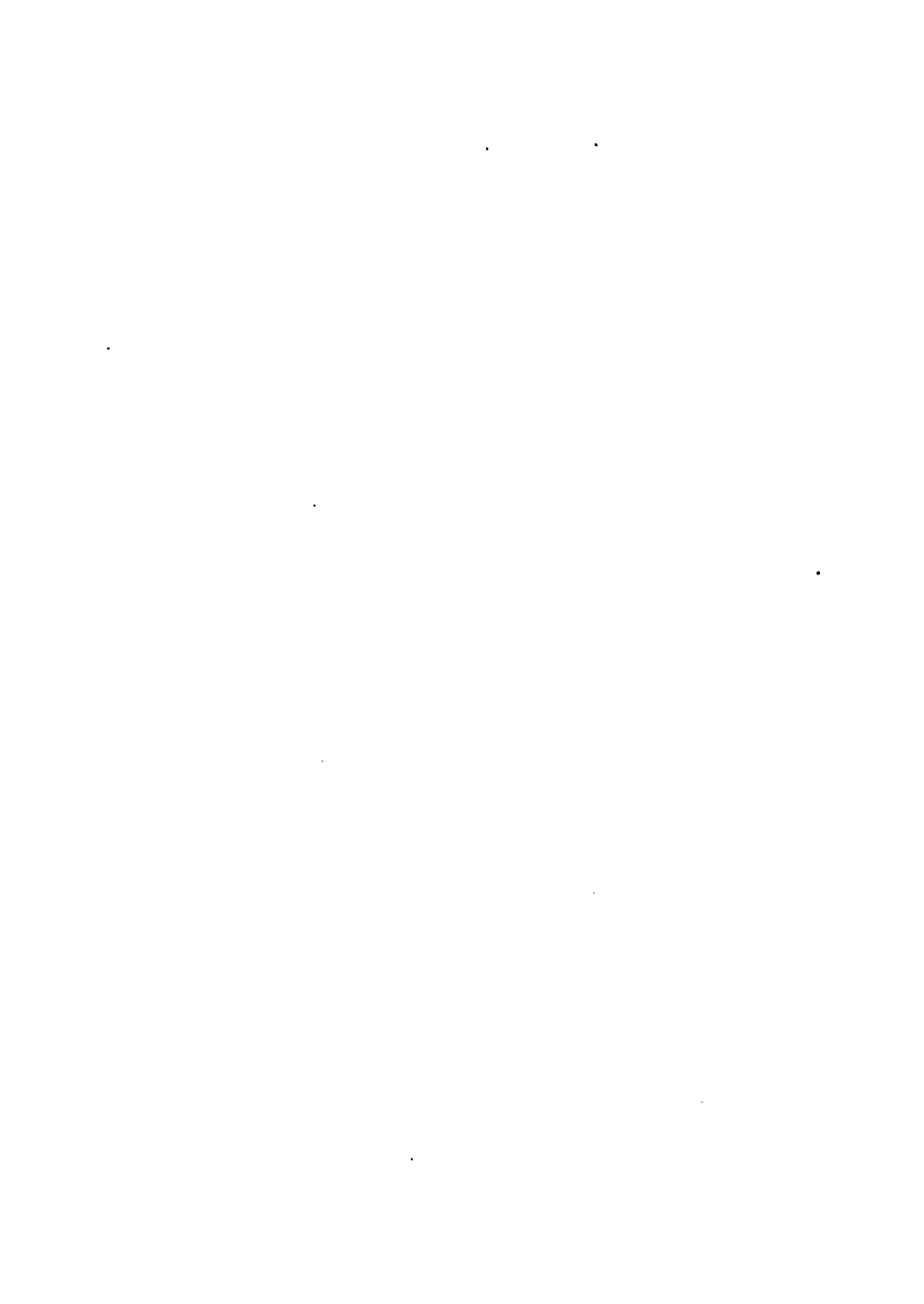
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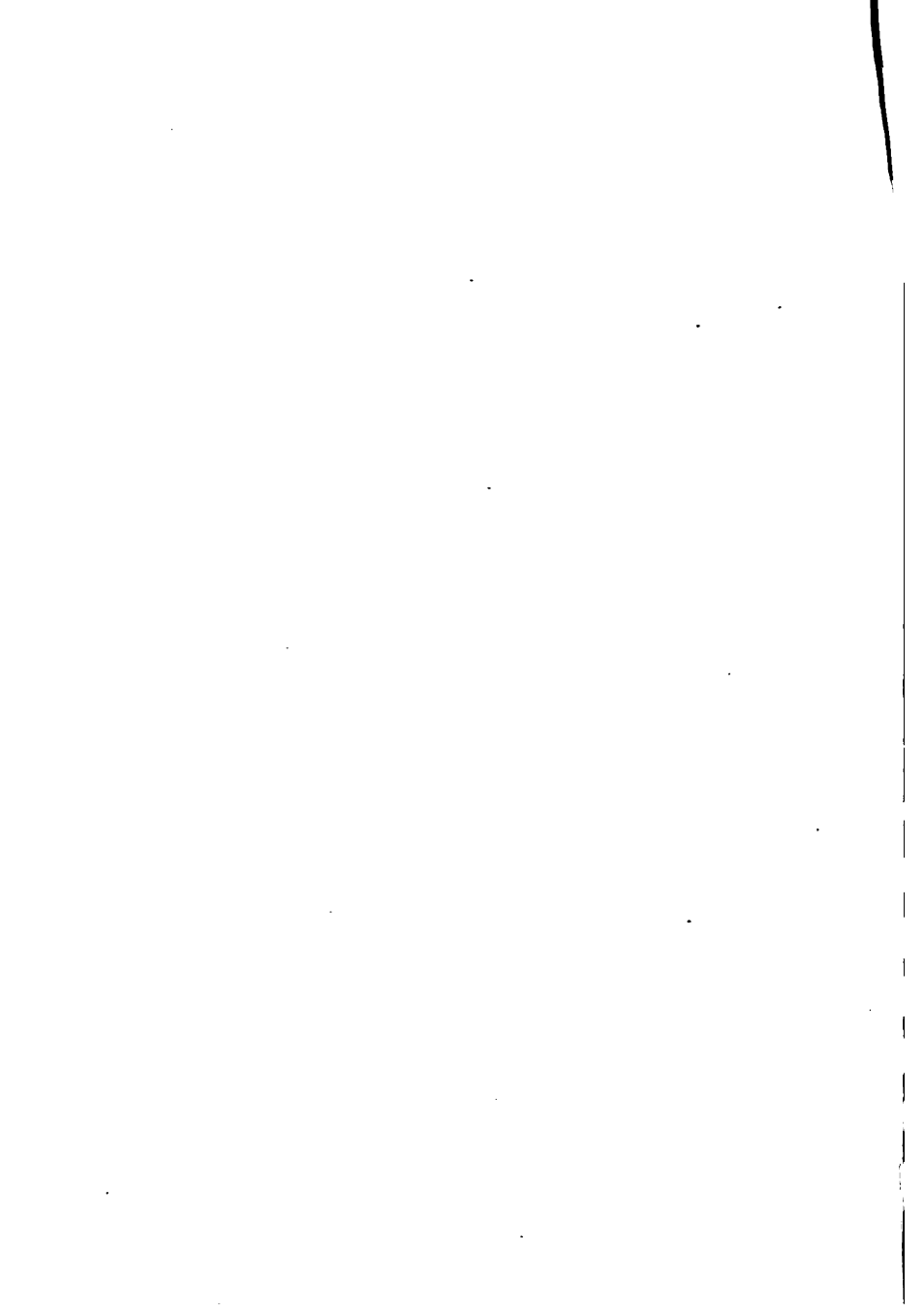
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